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Supreme Court of Appeals
Richmond, Va.

210 VA 163

Record Nos. 6985,6986

In the Supreme Court of Appeals of Virginia at Richmond

COMMONWEALTH OF VIRGINIA, EX REL., ETC.

v. Record No. 6985

SHELL OIL COMPANY

COMMONWEALTH OF VIRGINIA, EX REL., ETC.

v. Record No. 6986

SHELL OIL COMPANY

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6985

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 4th day of June, 1968.

COMMONWEALTH OF VIRGINIA, ex rel. State Tax Commissioner, Commissioner of the Division of Motor Vehicles, State Corporation Commission and the Attorney General of Virginia,

Plaintiff in error,

against

SHELL OIL COMPANY,

Defendant in error.

From the Circuit Court of the City of Richmond
John Wingo Knowles, Judge

Upon the petition of Commonwealth of Virginia, ex rel. State Tax Commissioner, Commissioner of the Division of Motor Vehicles, State Corporation Commission and the Attorney General of Virginia, a writ of error and *supersedeas* is awarded her to a judgment rendered by the Circuit Court of the City of Richmond on the 30th day of November, 1967, in a certain proceeding then therein depending, entitled, In re: Relief from Erroneous Assessment of and Collection from Shell Oil Company (Case No. A-1803); no bond being required.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

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Record No. 6985

page 1 }

* * * * *

PETITION FOR RELIEF FROM ERRONEOUS TAX ASSESSMENT AND COLLECTION

To the Honorable Judges of the Circuit Court of the City of Richmond:

The petition of Shell Oil Company respectfully represents:

1. That jurisdiction of this action is derived from Sections 58-1130 and 58-1131 of the Code of Virginia.

2. That petitioner is a Corporation, organized and existing under the laws of the State of Delaware with the right to do business under the General Corporate laws of the Commonwealth of Virginia and that 904 East Main Street, Richmond 19, Virginia c/o Robert H. Hanson, registered service agent, is the principal office at which claims against the petitioner may be audited, settled and paid.

3. That petitioner produces, refines, manufactures and compounds motor fuel and aviation fuel for marketing in the Commonwealth of Virginia and that at all times material herein marketed jet turbine aviation fuel, known as Shell 640 Kerosene, in the Commonwealth as a licensed "dealer" under Sections 58-693 through 58-710 of the Code of Virginia.

4. That during the period from January 1, 1956, through March 30, 1960, petitioner sold and delivered to Capital Airlines, Inc., at Norfolk and Richmond, Virginia, for use in Viscount Turbine Propeller Aircraft 2,949,716 gallons
page 2 } of Shell 640 Kerosene as detailed in Exhibit A attached hereto and made a part hereof.

5. That the aforementioned 2,949,716 gallons of Shell 640 Kerosene sold and delivered to Capital Airlines, Inc., at Norfolk and Richmond, Virginia, during the period January 1, 1956 through March 30, 1960, when subject to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (ASTM Desigantion D-86) showed:

IBP, 345 degrees Fahrenheit.

10% Evaporated (Recovered) between 350-400 degrees Fahrenheit.

20% Evaporated (Recovered) at a maximum of 392 degrees Fahrenheit.

50% Evaporated (Recovered) at a maximum of 450 degrees Fahrenheit.

90% Evaporated (Recovered) at a maximum of 500 degrees Fahrenheit.

95% Evaporated (Recovered) at a minimum of 465 degrees Fahrenheit.

EP, maximum 525 degrees Fahrenheit.

6. That Section 58-711 of the Code of Virginia, prior to the amendment thereof effective July 1, 1960, levied "* * * a tax of six cents per gallon on all motor fuel which is sold and delivered or used in this State * * *."; that Section 58-687 (2) of the Code of Virginia defines "Motor Fuel" as:

"All products commonly or commercially known or sold as gasoline, including casing-head and absorption or natural gasoline, regardless of their classifications or uses; and

"Any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as fuel in internal combusion engines, which, when subject to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (ASTM Designation D-86) show not less than 10% distilled (recovered) below 347 degrees F. (175 degrees C.) and not less than 95% distilled (recovered) below 464 degrees F. (240 degrees C.); provided, that the term 'motor fuel' shall not include

"(a) Industrial solvents or naphthas which distill by ASTM method D-86 not more than 9% at 176 degrees F. (80 degrees C.) and which have a distillation range of 150 degrees F. or less, or

page 3 } "(b) Liquified gases which would not exist as a liquid at a temperature of 60 degrees F. and a pressure of 14.7 pounds per square inch absolute.";

that the aforementioned 2,949,716 gallons of Shell 640 Kerosene sold and delivered by petitioner to Capital Airlines, Inc., at Norfolk and Richmond, Virginia, during the period from January 1, 1956, through March 30, 1960, did not come within the foregoing Section 58-687 (2) statutory definition of "Motor Fuel" and were therefore not subject to the tax imposed by the above-quoted Section 58-711 of the Code.

7. That notwithstanding the fact that Shell 640 Kerosene

did not constitute "Motor Fuel" within the statutory meaning of Section 58-687 (2) of the Code of Virginia, petitioner was erroneously assessed under Section 58-711 and timely paid a "Motor Fuel" tax to the Division of Motor Vehicles for the Commonwealth of Virginia at the rate of six cents per gallon on the aforementioned 2,949,716 gallons of Shell 640 Kerosene sold and delivered to Capital Airlines, Inc.; that pursuant to Section 58-715 of the Code of Virginia (effective prior to the March 30, 1960 amendment) Capital Airlines, Inc. received from the Commonwealth a refund of the full "Motor Fuel" tax paid on 1,907,317 gallons of the aforementioned Shell 640 Kerosene which were consumed in its aircraft in flights outside the boundaries of the Commonwealth (details in Exhibit A); and that pursuant to Section 58-715 of the Code of Virginia (effective prior to the March 30, 1960 amendment) Capital Airlines, Inc. received from the Commonwealth a refund of two cents per gallon of the motor fuel tax paid on the remaining 1,042,399 gallons of the aforementioned Shell 640 Kerosene which were consumed in its aircraft in flights over and within the boundaries of the Commonwealth (details in Exhibit A).

8. That petitioner, on behalf of Capital Airlines, Inc.,[1] and pursuant to Sections 58-1118 and 58-1119 of the Code of Virginia, made timely application to the Department
page 4 } of Taxation for a correction of the erroneous assessment and for a refund of the four cents per gallon tax erroneously collected and still retained by the Commonwealth on 1,042,399 gallons of the aforementioned Shell 640 Kerosene sold and delivered to Capital Airlines, Inc. at Norfolk and Richmond, Virginia during the period from January 1956 through March 1960 (details in Exhibit A); that said application was made to the Department of Taxation on December 23, 1959, with respect to gallonage sold and delivered during the period from January 1, 1956 through December 31, 1958, and was made on June 1, 1960 with respect to gallonage sold and delivered during the period from January 1, 1959, through March 30, 1960; and that the Department of Taxation has failed to take any action on petitioner's application.

9. That the erroneous tax assessment and collection for which relief is requested was not caused by the willful failure or refusal of petitioner to furnish the tax-assessing authority with the necessary information as required by law.

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[1] On June 1, 1961 Capital Airlines, Inc. was merged into United Air Lines, Inc. at which time all property, rights, privileges, powers, franchises and things in Action, and all and every other interest belonging to Capital vested in United.

WHEREFORE, petitioner prays that the Court, pursuant to Section 58-1134 of the Code of Virginia, correct the erroneous assessment and enter an order directing the proper officials of the Commonwealth of Virginia to refund to petitioner the "Motor Fuel" tax erroneously collected and retained on 1,042,399 gallons of Shell 640 Kerosene at the rate of four cents per gallon in the total amount of $41,695.96, and for such other further and general relief as to the Court may seem just and proper.

Filed in the Clerk's Office the 31st day of August, 1961, Teste: #A-1803 Luther Libby, Jr., Clerk By Jessie M. Haddon, D. C.

* * * * *

page 9 }

* * * * *

DEMURRER

Now come Frederick T. Gray, Attorney General of Virginia, C. H. Morrissett, State Tax Commissioner of Virginia, C. H. Lamb, Commissioner of the Division of Motor Vehicles of Virginia, and Jesse W. Dillon, Commissioner of the State Corporation Commission of Virginia, and say that the petition filed by the Shell Oil Company against them is insufficient at law for the following reasons:

1. This Court does not have jurisdiction of this action under Sections 58-1130 and 58-1131 of the Code of Virginia as alleged in paragraph 1 of the petition. Said sections of the Code apply only to an assessment of—

(a) Any State license tax, or
(b) Any State capitation tax, or
(c) Any State tax assessed under the provisions of Sections 58-54 to 58-63 (recording taxes), 58-66 to 58-76 (taxes on wills and administrations).

The tax which is the subject of this petition is the motor fuel tax levied under the provisions of Section 58-711 of the Code. Said tax does not fall in any of the above categories.

page 10 } 2. No tax was assessed or could be assessed

under Section 58-711 of the Code as alleged in paragraph 7 of said petition. The only assessment that can be made under the Motor Vehicle Fuel Tax Act, Chapter 13, Title 58, of the Code is made under Section 58-726, when a dealer neglects or refuses to make and file a report for any calendar month, or when such dealer files an incorrect or fraudulent report.

3. Petitioner has not been aggrieved by any act of any agent of the Commonwealth of Virginia. As petitioner sold the fuel to the Capitol Air Lines and was paid by the Capitol Air Lines, Inc., the entire amount of the tax, the petitioner has no standing in an action seeking reimbursement or refund. A refund of two cents per gallon has already been paid to the Capitol Air Lines, Inc. on the 1,042,399 gallons described in paragraph 7 of the petition, in full compliance with the statute. No further refunds can be made under the provisions of the Code permitting refunds, to-wit, Sections 58-715, 58-717, 58-718 and 58-719 of the Code of Virginia.

4. There is no privity between the Capitol Air Lines, Inc., (United Air Lines, Incorporated) and the petitioner which would permit the petitioner to sue on behalf of the Capitol Air Lines or its successor, the United Air Lines, Incorporated.

5. The petitioner paid the motor fuel taxes which are described in the petition voluntarily to the Virginia Division of Motor Vehicles when it made reports pursuant to the provisions of Sections 58-713 and 58-713.1 of the Code of Virginia. No assessment was made.

6. There is no provision in the statutes which gives the petitioner the relief he now seeks on behalf of the Capitol Air Lines, Inc. (United Air Lines, Incorporated).

7. That the 2,949,716 gallons of Shell 640 kerosene referred to in paragraph 6 of the said petition was motor
page 11 } fuel within the meaning of Chapter 13, Title 58, Code of Virginia, commonly known as the Motor Fuel Tax Act, and the same were subject to the tax levied under the provisions of Section 58-711 of the Code.

* * * * *

Received and filed 1961 Sep 20, Luther Libby, Jr., Clerk, By E. M. Edwards, D.C.

page 12 }

* * * * *

NO. A-1803

ORDER OVERRULING DEMURRER

This case came on to be heard upon the demurrer of the defendants filed herein, and was argued by counsel.

Upon consideration whereof, the Court being of the opinion that the Petition filed herein is sufficient in law, the Court doth ORDER that the said demurrer be, and the same hereby is, overruled; to which action of the Court counsel for the defendants excepted, and the Court doth further ORDER that the defendants file their pleadings in response within twenty-one (21) days from the date of this order.

Dated: 5/18/62

Enter this:

John Wingo Knowles
Judge

We ask for this:
Joseph C. Carter, Jr.
Of Counsel for Petitioner

Seen and objected to:
D. Gardiner Tyler
Of Counsel for Defendants

* * * * *

page 13 }

* * * * *

NO. A-1803

MOTION TO STRIKE

Now comes the defendant, by counsel, and moves the court to strike for the following reason:

The petitioner is a foreign corporation and there is not

located within the City of Richmond an office at which claims against it may be audited, settled and paid. Therefore, this court cannot entertain jurisdiction under Section 58-1130 of the Code of Virginia (1950), as amended.

Commonwealth of Virginia
By A. R. Woodroof
Counsel

J. W. Fielder

* * * * *

Received and filed 1962 June-8, Luther Libby, Jr., Clerk, By E. M. Edwards, D. C.

* * * * *

NO. A-1803

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, by counsel, and moves the court for a summary judgment for the following reasons:

(1) The petitioner is not the aggrieved party within the purview of the statute under which recovery is sought.

(2) The petitioner would be unjustly enriched if recovery were had under this action.

Commonwealth of Virginia
By A. R. Woodroof
Counsel

* * * * *

Received & filed 1962 Jun-8, Luther Libby, Jr., Clerk, By E. M. Edwards, D. C.

page 17 }

* * * * *

NO. A-1803

ANSWER

For an answer to the petition filed against her in this court by the Shell Oil Company, or to so much thereof as she

is advised that it is material she should answer, the Commonwealth of Virginia, answers and says:

1. The defendant expressly denies the allegation contained in paragraph numbered 1 of the petition and avers that the sections of the Code of Virginia there cited do not include jurisdiction of the court for this action for the following reasons:

(a) These sections do not have reference to excise or sales tax on motor fuel but only to the taxes therein specifically named;

(b) These sections refer only to assessed taxes whereas the motor fuel tax complained of was not assessed but levied;

(c) These sections being in derogation of the common law must be strictly construed as to subject matter.

2. The defendant denies the allegation contained in paragraph numbered 2 of the petition filed against her, "that 904 East Main Street, Richmond 19, Virginia, c/o Robert H. Hanson, registered service agent, is the principal office at

page 18 } which claims against the petitioner may be audited, settled and paid." The defendant has always found it necessary to make all required audits at locations outside of this State, the present location for such purposes being 200 Joppa Road, Baltimore 4, Maryland. Since such office is not located in the City of Richmond, the requirements of Section 58-1130, Code of Virginia (1950), as amended, are not met and this court does not have jurisdiction.

3. In response to paragraph numbered 3 of the petition, the defendant admits that the petitioner is a licensed dealer under Chapter 13 of Title 58, Code of Virginia (1950) as amended.

4. In response to paragraph numbered 4 of the petition, the defendant admits that during the period January 1, 1956 through March 30, 1960 petitioner sold and delivered 2,949,716 gallons of motor fuel and made reports pursuant to Sections 58-713 and 58-713.1, Code of Virginia (1950), as amended, describing said fuel as aviation fuel.

5. The defendant denies the allegation contained in paragraph numbered 5 of the petition that the data shown represents distillation results but believes the same to represent specification figures which do not correspond to actual tests and will place the petitioner upon strict proof that the specified gallonage of aviation fuel failed to fall within the definition of "aviation fuel" upon which the tax was levied.

6. The defendant admits that Section 58-687 of the Code did contain in part the language set forth in paragraph numbered 6 of the petition but denies that such language excludes the consideration of other portions of the Motor Fuel Tax Act in determining tax liability.

page 19 } 7. The defendant expressly denies that an assessment for motor fuel taxes was made against the petitioner and calls for strict proof thereof. The defendant admits that petitioner voluntarily paid the tax on the stated gallonage pursuant to the statutes made and provided. It is likewise admitted that pursuant to the statute Capital Airlines, Inc., applied for and received from defendant's agents a refund of the full motor fuel tax paid on 1,907,317 gallons of such fuel consumed in its aircraft in flights outside the boundaries of the Commonwealth and a refund of two cents per gallon on the motor fuel tax paid on 1,042,399 gallons of such fuel consumed in its aircraft in flights over and within the boundaries of this Commonwealth, in full compliance with the law.

8. In response to petitioner's paragraph numbered 8 the defendant denies that petitioner made valid application to the Department of Taxation for refund.

9. The petitioner has not been aggreived by any action of any agent of the Commonwealth of Virginia and hence is not an aggrieved party as contemplated by Section 58-1130 of the Code. The granting of relief under the petition would unjustly enrich the petitioner and should not be permitted by this honorable court.

10. The tax levied under Chapter 13 of Title 58, Code of Virginia (1950), as amended, refers to all motor fuel sold and delivered or used in this State. As petitioner sold the fuel to the Capital Airlines, Inc., and was paid by the Capital Airlines, Inc., the entire amount of the tax, the

page 20 } petitioner has no standing in an action seeking reimbursement or refund. Applications for refunds made by said Capital Airlines, Inc., during the period November 1, 1956 through March 30, 1960 are filed herewith as Defendant's Exhibit No. 1.

11. From enactment of the statutes relating to "aviation fuel" in 1948 through the entire period under consideration the defendant's agents administering the motor fuel tax laws have construed the term "aviation fuel" as defined under Chapter 13 of Title 58, Code of Virginia (1950), as amended, (former §2154 Michie Code 1942) to include all "motor fuel designed for use in the operation of aircraft and sold or used for that purpose," just as the definition here quoted implies.

Administrative construction has always placed all commercial aviation turbin fuel squarely within the taxing machinery of the aforesaid Chapter 13 and the fuel referred to by petitioner as "Shell 640" has been considered typical of commercial aviation turbin fuel, and vice versa. This fuel is sold by a number of dealers, all of whom, including the petitioner, with all the facts concerning such fuel in their hands and control have voluntarily reported the sale and paid the tax on millions of gallons of such fuel. Invariably the aviation companies who purchased this fuel from the dealers have likewise considered it motor fuel and have requested and received the refunds of motor fuel and have requested and received the refunds of motor fuel tax allowed under the aforementioned Chapter 13.

12. Under the terms of Section 58-1130 of the Code the recovery sought by petitioner for the years 1956, 1957 and 1958 is barred, as the application was not timely

page 21 } made.

Wherefore, your respondent prays that the petition filed against her be dismissed and petitioner's prayer be denied.

* * * * *

page 23 }

* * * * *

NO. A-1803

ORDER

WHEREAS, the Commonwealth of Virginia has filed a motion to amend in certain respects Paragraph 7 of her answer, it is hereby

ORDERED that Paragraph 7 of the answer filed herein be amended by inserting the following after the first sentence in said paragraph, to-wit:

"If an assessment were made under Section 58-711 of the Code of Virginia as alleged, then the petitioner could have availed itself of the procedure provided in Section 58-689,

Code of Virginia (1950). Having failed to do so, the relief sought is now barred."

Enter: 11/5/62

John Wingo Knowles
Judge

* * * * *

page 25 }

* * * * *

NO. A-1803

PETITION FOR CORRECTION OF ERRONEOUS TAX ASSESSMENT (No. A-1803)

ORDER

Whereas, Petitioner herein has filed a Motion to Amend in certain respects paragraph 5 of its Petition, it is hereby ORDERED that paragraph 5 of the Petition filed herein be amended by inserting the word "Distilled" for the word "Evaporated" wherever the latter word appears in paragraph 5 of the Petition.

Dated: 11/5/62

Enter this:

John Wingo Knowles
Judge

* * * * *

page 26 }

* * * * *

NO. A-1803

STIPULATION

It is hereby stipulated between the parties that the 2,949,716 gallons of Shell 640 Kerosene sold and delivered to Capital

Air Lines, Incorporated, at Norfolk and Richmond, Virginia, during the period January 1, 1956 through March 30, 1960, were subjected to regular distillation tests administered in accordance with the standard method for distillation of gasoline , naphtha, kerosene and similar petroleum products (ASTM Designation D-86), and showed the following results:

IBP, 345 degrees Fahrenheit.
10% Distilled (Recovered) between 350-400 degrees Fahrenheit.
20% Distilled (Recovered) at a maximum of 392 degrees Fahrenheit.
50% Distilled (Recovered) at a maximum of 450 degrees Fahrenheit.
Fahrenheit.
90% Distilled (Recovered) at a maximum of 500 degrees
95% Distilled (Recovered) at a minimum of 465 degrees Fahrenheit.
EP, maximum 525 degrees Fahrenheit.

page 27 } In so stipulating, the defendants reserve their objections to the materiality and relevancy of these test results and, further, reserve their contention that, irrespective of these test results, the said 2,949,716 gallons of Shell 640 Kerosene is included within the meaning of the term "aviation fuel" as contemplated in Chapter 13, Title 58, Code of Virginia (1950) in force when the tax on said fuel was paid.

Dated: October 31, 1962

* * * * *

page 29 }

* * * * *

NO. A-1803
and
NO. A-1808

ORDER SUSTAINING MOTION TO QUASH

This case came on April 11, 1963, to be heard upon a Notice and Motion to Quash the Notice to Take the Deposition of the Honorable Robert F. Baldwin of Norfolk, Virginia, and was argued by counsel.

Upon consideration whereof, the Court being of the opinion that whereas the only ground for taking the deposition is that the witness allegedly is more than 100 miles from Richmond and for good cause shown there exists concern in respect to the nature and admissibility of the testimony of the witness, the Court doth ORDER that the Motion to Quash is sustained, to which action of the Court counsel for the defendants excepted.

Dated: 4/18/63

Enter this:

John Wingo Knowles
Judge

We ask for this:
John J. Adams
Of Counsel for Petitioner

Seen and Objected to:
The action of the court is not based on any ground set forth in said motion and no cause was shown why the witness who resides more than 100 miles from the city of Richmond should be required to attend the court in person.

D. Gardiner Tyler
Of Counsel for Defendants

* * * * *

page 30 }

* * * * *

NO. A-1803

FINAL ORDER

This case was regularly matured, docketed, heard by the Court and argued and briefed by counsel.

Upon mature consideration whereof, and it appearing to the Court that final judgment should be entered for the petitioner against the defendants.

It is ADJUDGED and ORDERED that the petitioner recover of the defendants the sum of Thirty-Four Thousand

Eight Hundred Thirty-Five Dollars and Sixty-Eight Cents ($34,835.68), to all of which action the defendants, by counsel, object and except. On motion of the defendants, by counsel, the Court grants a stay of execution to this judgment for a period of 60 days from the date hereof in order to permit the defendants to apply to the Supreme Court of Appeals of Virginia for a writ of error herein, if they be so advised,

And it is further ADJUDGED and ORDERED that the Court's memorandum of opinion dated October

page 31 } 16, 1967, be made part of the record herein.

Dated: November 30, 1967.

Enter this:

John Wingo Knowles
Judge

I ask for this:
Joseph C. Carter, Jr.
Counsel for Petitioner

Seen and objected to:
D. Gardiner Tyler
Counsel for Defendants

* * * * *

page 39 }

* * * * *

CASE NO. A-1803

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court of the City of Richmond:

The Commonwealth of Virginia, acting by and through the State Tax Commissioner, the Commissioner of the Division of Motor Vehicles, one of the Commissioners of the State Corporation Commission and the Attorney General of Vir-

ginia, hereby give notice of appeal from the final judgment entered in this case on November 30, 1967, and sets forth the following assignments of error:

1. That the Court erred in assuming jurisdiction of this case under Section 58-1130 of the Code of Virginia (1950).

2. That the Court erred in failing to rule that the Shell Oil Company could have timely proceeded under Section 58-689 of the Code to test the validity of the determination of the Commissioner of the Division of Motor Vehicles that it was required to file the reports and pay the taxes enumerated in Chapter 13 of Title 58 of the Code, and not having done so, is now barred from recovering the alleged erroneous taxes which it voluntarily paid.

page 40 } 3. That the Court erred in overruling the defendant's demurrer to the petition filed by the Shell Oil Company seeking a refund of the taxes on aviation fuel.

4. That the Court erred in holding that the Shell Oil Company was an aggrieved person within the meaning of Section 58-1130 of the Code, and thereby had the right to institute and maintain an action at law under said section although it had no pecuniary interest in the funds it sought to collect from the Commonwealth as refunds.

5. That the Court erred in holding that the aviation fuel (upon which the taxes were paid) was not taxable under the statutes made and provided.

6. That the Court erred in holding that there had been an assessment of the motor fuel taxes against the Shell Oil Company when as a matter of fact said company paid the taxes voluntarily after being informed by the Division of Motor Vehicles that it was required to file reports, including such taxes.

7. That the Court erred in quashing the notice to take depositions of the Honorable Robert F. Baldwin who was Chairman of the Commission created by the General Assembly of Virginia in 1950 to study the gas and use fuel tax statutes and make recommendations as to necessary changes in said statutes, and who subsequently was one of the patrons of the bill which amended Section 58-687 of the Code in 1952, the said Baldwin residing more than one hundred miles from the city of Richmond.

8. That the Court erred in rendering judgment against the defendants.

* * * * *

Received & filed Jan 16 1968 Luther Libby, Jr., Clerk, By Jean K. Martin, D. C.

Record No. 6986

page 1 }

PETITION FOR RELIEF FROM ERRONEOUS TAX ASSESSMENT AND COLLECTION

To the Honorable Judges of the Circuit Court of the City of Richmond:

The petition of Shell Oil Company respectfully represents:

1. That jurisdiction of this action is derived from Sections 58-1130, 58-1131 and 58-1134 of the Code of Virginia.

2. That petitioner is a Corporation, organized and existing under the laws of the State of Delaware with the right to do business under the General Corporate laws of the Commonwealth of Virginia and that 10 South 10th Street, Richmond 19, Virginia, c/o James R. Farley, registered service agent, is the principal office at which claims against the petitioner may be audited, settled and paid.

3. That petitioner produces, refines, manufactures and compounds motor fuel and aviation fuel for marketing in the Commonwealth of Virginia and that at all times material herein marketed jet turbine aviation fuel, known as Shell 640 Kerosene, in the Commonwealth as a licensed "dealer" under Sections 58-693 through 58-710 of the Code of Virginia.

4. That during the period from November 1, 1958, through March 30, 1960, petitioner sold and delivered to Piedmont Aviation, Inc., at Lynchburg, Norfolk, Richmond page 2 } and Roanoke, Virginia, for use in Fairchild Turbine Propeller Aircraft 1,709,797 gallons of Shell 640 Kerosene as detailed in Exhibit A attached hereto and made a part hereof.

5. That the aforementioned 1,709,797 gallons of Shell 640 Kerosene sold and delivered to Piedmont Aviation, Inc., at Lynchburg, Norfolk, Roanoke and Richmond, Virginia, during the period November 1, 1958 through March 30, 1960, when subject to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (ASTM Designation D-86) showed:

IBP, 345 degrees Fahrenheit.

10% Evaporated (Recovered) between 350-400 degrees Fahrenheit.

20% Evaporated (Recovered) at a maximum of 392 degrees Fahrenheit.

50% Evaporated (Recovered) at a maximum of 450 degrees Fahrenheit.

90% Evaporated (Recovered) at a maximum of 500 degrees Fahrenheit.

95% Evaporated (Recovered) at a minimum of 465 degrees Fahrenheit.

EP, maximum 525 degrees Fahrenheit.

6. That Section 58-711 of the Code of Virginia, prior to the amendment thereof effective July 1, 1960, levied " * * * a tax of six cents per gallon on all motor fuel which is sold and delivered or used in this State * * * ."; that Section 58-687 (2) of the Code of Virginia defines "Motor Fuel" as:

"All products commonly or commercially known or sold as gasoline, including casing-head and absorption or natural gasoline, regardless of their classifications or uses; and

"Any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as fuel in internal combusion engines, which, when subject to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (ASTM Designation D-86) show not less than 10% distilled (recovered) below 347 degrees F. (175 degrees C.) and not less than 95% distilled (recovered) below 464 degrees F. (240 degrees C.); provided, that the term 'motor fuel' shall not include

page 3 } "(a) Industrial solvents or naphthas which distill by ASTM method D-86 not more than 9% at 176 degrees F. (80 degrees C.) and which have a distillation range of 150 degrees F. or less, or

"(b) Liquified gases which would not exist as a liquid at a temperature of 60 degrees F. and a pressure of 14.7 pounds per square inch absolute.";

that the aforementioned 1,709,797 gallons of Shell 640 Kerosene sold and delivered by petitioner to Piedmont Aviation, Inc., at Lynchburg, Norfolk, Richmond and Roanoke, Virginia, during the period from November 1, 1958, through March 30, 1960, did not come within the foregoing Section 58-687 (2) statutory definition of "Motor Fuel" and were therefore not subject to the tax imposed by the above-quoted Section 58-711 of the Code.

7. That notwithstanding the fact that Shell 640 Kerosene did not constitute "Motor Fuel" within statutory meaning of Section 58-687 (2) of the Code of Virginia, petitioner

was erroneously assessed under Sections 58-711 and 58-713 and timely paid a "Motor Fuel" tax to the Division of Motor Vehicles for the Commonwealth of Virginia at the rate of six cents per gallon on the aforementioned 1,709,797 gallons of Shell 640 Kerosene sold and delivered to Piedmont Aviation, Inc.; that pursuant to Section 58-715 of the Code of Virginia (effective prior to the March 30, 1960 amendment) Piedmont Aviation, Inc., received from the Commonwealth a refund of the full "Motor Fuel" tax paid on 730,938 gallons of the aforementioned Shell 640 Kerosene which were consumed in its aircraft in flights outside the boundaries of the Commonwealth (details in Exhibit A); and that pursuant to Section 58-715 of the Code of Virginia (effective prior to the March 30, 1960 amendment) Piedmont Aviation, Inc., received from the Commonwealth a refund of two cents per gallon of the motor fuel tax paid on 937,368 gallons of the aforementioned Shell 640 Kerosene which were consumed in its aircraft in flights over and within the boundaries of the Commonwealth (details in Exhibit A).

page 4 } 8. That the erroneous tax assessment and collection for which relief is requested was not caused by the willful failure or refusal of petitioner to furnish the tax-assessing authority with the necessary information as required by law.

WHEREFORE, petitioner prays that the Court, pursuant to Section 58-1134 of the Code of Virginia, correct the erroneous assessment and enter an order directing the proper officials of the Commonwealth of Virginia to refund to petitioner the "Motor Fuel" Tax erroneously collected and retained on 937,368 gallons of Shell 640 Kerosene at the rate of four cents per gallon in the total amount of $37,494.72, and for such other further and general relief as to the Court may seem just and proper.

* * * * *

Filed in the Clerk's Office the 29th day of Dec., 1961.

page 5 } Exhibit A

PIEDMONT AVIATION, INC.

Kerosene Purchases in Commonwealth of Virginia From Shell Oil Company

For the Period Nov. 1, 1958, through March 29, 1960

Month of Purchase and Use	Year	Total gallons of Kerosene	Gallons used outside Virginia on which the full 6¢ per gallon tax was refunded	Gallons used in Virginia on which full 6¢ per gallon tax was paid and 4¢ per gallon tax retained
November	1958	34,058	0	0
December	1958	17,071	5,663	11,544
January	1959	48,725	16,142	23,626
February	1959	43,199	25,277	24,721
March	1959	73,088	31,423	44,258
April	1959	93,566	28,114	54,471
May	1959	117,745	50,215	68,139
June	1959	136,051	48,908	68,651
July	1959	131,788	46,976	72,317
August	1959	116,567	52,616	74,272
September	1959	128,815	52,642	68,498
October	1959	119,893	59,135	76,751
November	1959	160,908	70,141	82,633
December	1959	147,206	75,026	75,241
January	1960	134,601	54,488	73,456
February	1960	115,292	50,064	67,337
March	1960	91,224	64,108	51,453
		1,709,797	730,938	937,368

Tax Paid (1,709,797 @ 6¢)		$102,587.82
Less: Refunds (730,938 @ 6¢)*	$43,856.28	
(937,368 @ 2¢)	18,747.36	
Sales (41,491 @ 6¢)	2,489.46	65,093.10
Balance due		$ 37,494.72

*Includes March 29, 1960 inventory which was recovered when reporting change-over on October, 1960 Refund in amount of 23,189 gallons.

* * * * *

page 7 }

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DEMURRER

Now come Robert Y. Button, Attorney General of Virginia, C. H. Morrissett, State Tax Commissioner of Virginia, C. H. Lamb, Commissioner of the Division of Motor Vehicles of Virginia, and Jesse W. Dillon, Commissioner of the State Corporation Commission of Virginia, and say that the petition filed by the Shell Oil Company against them is insufficient at law for the following reasons:

1. This Court does not have jurisdiction of this action under Sections 58-1130, 58-1131 and 58-1134 of the Code of Virginia as alleged in paragraph 1 of the petition. Said sections of the Code apply only to an assessment of—

(a) Any state tax on property or income, or

(b) Any State license tax, or

(c) Any State tax assessed under the provisions of Sections 58-54 to 58-63 (recording taxes), 58-66 to 58-76 (taxes on wills and administrations), or

(d) Any State capitation tax.

The tax which is the subject of this petition is the motor fuel tax levied under the provisions of Section 58-711 of the Code. Said tax does not fall in any of the above categories.

page 8 } 2. No tax was assessed or could be assessed under Section 58-711 of the Code as alleged in paragraph 7 of said petition. The only assessment that can be made under the Motor Fuel Tax Act, Chapter 13, Title 58, of the Code is made under Section 58-726, when a dealer neglects or refuses to make and file a report for any calendar month, or when such dealer files an incorrect or fraudulent report.

3. Petitioner has not been aggrieved by any act of any agent of the Commonwealth of Virginia. As petitioner sold the fuel to the Piedmont Aviation, Inc., and was paid by the Piedmont Aviation, Inc., the entire amount of the tax, the petitioner has no standing in an action seeking reimbursement or refund. A refund of two cents per gallon has already been paid to the Piedmont Aviation, Inc., on the 937,368 gallons described in paragraph 7 of the petition, in full compliance with the statute. No further refunds can be made under the provisions of the Code permitting refunds, to-wit, Sections 58-715, 58-717, 58-718 and 58-719 of the Code of Virginia.

4. There is no privity between the Piedmont Aviation, Inc., and the petitioner which would permit the petitioner to sue on behalf of the Piedmont Aviation, Inc.

5. The petitioner paid the motor fuel taxes which are described in the petition voluntarily to the Virginia Division of Motor Vehicles when it made reports pursuant to the provisions of Sections 58-713 and 58-713.1 of the Code of Virginia. No assessment was made.

6. There is no provision in the statutes which gives the petitioner the relief he now seeks on behalf of the Piedmont Aviation, Inc.

7. That the 1,709,797 gallons of Shell 640 kerosene referred to in paragraph 6 of the said petition was motor fuel within the meaning of Chapter 13, Title 58,
page 9 } Code of Virginia, commonly known as the Motor Fuel Tax Act, and the same were subject to the tax levied under the provisions of Section 58-711 of the Code.

* * * * *

Received & filed 1962 Jan. 18, Luther Libby, Jr., Clerk, By E. M. Edwards, D. C.

page 10 }

* * * * *

NO. A-1808

ORDER OVERRULING DEMURRER

This case came on to be heard upon the demurrer of the defendants filed herein, and was argued by counsel.

Upon consideration whereof, the Court being of the opinion that the Petition filed herein is sufficient in law, the Court doth ORDER that the said demurrer be, and the same hereby is, overruled; to which action of the Court counsel for the defendants excepted, and the Court doth further

ORDER that the defendants file their pleadings in response within twenty-one (21) days from the date of this order.

Dated: 5/18/62

Enter this:

John Wingo Knowles
Judge

We ask for this:
Joseph C. Carter, Jr.
Of Counsel for Petitioner

Seen and objected to:
D. Gardiner Tyler
Of Counsel for Defendants

* * * * *

page 11 }

* * * * *

NO. A-1808

MOTION TO STRIKE

Now comes the defendant, by counsel, and moves the court to strike for the following reason:

The petitioner is a foreign corporation and there is not located within the City of Richmond an office at which claims against it may be audited, settled and paid. Therefore, this court cannot entertain jurisdiction under Section 58-1130 of the Code of Virginia (1950), as amended.

Commonwealth of Virginia
By A. R. Woodroof
Counsel

J. W. Fielder

* * * * *

Received & filed 1962 Jun 8, Luther Libby, Jr., Clerk, By E. M. Edwards, D. C.

* * * * *

page 13 }

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NO. A-1808

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, by counsel, and moves the court for a summary judgment for the following reasons:

(1) The petitioner is not the aggrieved party within the purview of the statute under which recovery is sought.

(2) The petitioner would be unjustly enriched if recovery were had under this action.

* * * * *

Received & filed 1962 Jun 8, Luther Libby, Jr., Clerk, By E. M. Edwards, D. C.

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NO. A-1808

ANSWER

For an answer to the petition filed against her in this court by the Shell Oil Company, or to so much thereof as she is advised that it is material she should answer, the Commonwealth of Virginia, answers and says:

1. The defendant expressly denies the allegation contained in paragraph numbered 1 of the petition and avers that the sections of the Code of Virginia there cited do not include jurisdiction of the court for this action for the following reasons:

(a) These sections do not have reference to excise or sales tax on motor fuel but only to the taxes therein specifically named;

(b) These sections refer only to assessed taxes whereas

the motor fuel tax complained of was not assessed but levied; and

(c) These sections being in derogation of the common law must be strictly construed as to subject matter.

2. The defendant denies the allegation contained in paragraph numbered 2 of the petition filed against her, "that 10 South 10th Street, Richmond 19, Virginia, c/o
page 16 } James R. Farley, registered service agent, is the principal office at which claims against the petitioner may be ordered, settled and paid." The defendant has always found it necessary to make all required audits at locations outside of this State, the present location for such purposes being 200 Joppa Road, Baltimore 4, Maryland. Since such office is not located in the City of Richmond, the requirements of Section 58-1130, Code of Virginia (1950), as amended, are not met and this court does not have jurisdiction.

3. In response to paragraph numbered 3 of the petition, the defendant admits that the petitioner is a licnesed dealer under Chapter 13 of Title 58, Code of Virginia (1950), as amended.

4. In response to paragraph numbered 4 of the petition, the defendant admits that during the period November 1, 1958 through March 30, 1960 petitioner sold and delivered 1,709,797 gallons of motor fuel and made reports pursuant to Sections 58-713 and 58-713.1, Code of Virginia (1950), as amended, describing said fuel as aviation fuel.

5. The defendant denies the allegation contained in paragraph numbered 5 of the petition that the data shown represents distillation results but believes the same to represent specification figures which do not correspond to actual tests and will place the petitioner upon strict proof that the specified gallonage of aviation fuel failed to fall within the definition of "aviation fuel" upon which the tax was levied.

6. The defendant admits that Section 58-687 of the Code did contain in part the language set forth in paragraph numbered 6 of the petition but denies that such language excludes the consideration of other portions of the Motor Fuel Tax Act in determining tax liability.

page 17 } 7. The defendant expressly denies that an assessment for motor fuel taxes was made against the petitioner and calls for strict proof thereof. The defendant admits that petitioner voluntarily paid the tax on the stated gallonage pursuant to the statutes made and provided. It is likewise admitted that pursuant to the statute Piedmont

Aviation, Inc., applied for and received from defendant's agents a refund of the full motor fuel tax paid on 730,938 gallons of such fuel consumed in its aircraft in flights outside the boundaries of the Commonwealth and a refund of two cents per gallon on the motor fuel tax paid on 937,368 gallons of such fuel consumed in its aircraft in flights over and within the boundaries of this Commonwealth, in full compliance with the law.

8. The petitioner has not been aggrieved by any action of any agent of the Commonwealth of Virginia and hence is not an aggrieved party as contemplated by Section 58-1130 of the Code. The granting of relief under the petition would unjustly enrich the petitioner and should not be permitted by this honorable court.

9. The tax levied under Chapter 13, of Title 58, Code of Virginia (1950), as amended, refers to all motor fuel sold and delivered or used in this State. As petitioner sold the fuel to the Piedmont Aviation, Inc., and was paid by the Piedmont Aviation, Inc., the entire amount of the tax, the petitioner has no standing in an action seeking reimbursement or refund. Applications for refunds made by Piedmont Aviation, Inc., are filed herewith as Defendant's Exhibit No. 1.

10. From enactment of the statutes relating to "aviation fuel" in 1948 through the entire period under consideration the defendant's agents administering the motor page 18 } fuel tax laws have construed the term "aviation fuel" as defined under Chapter 13 of Title 58, Code of Virginia (1950), as amended, (former § 2154 Michie Code (1942) to include all "motor fuel designed for use in the operation of aircraft and sold or used for that purpose," just as the definition here quoted implies. Administrative construction has always placed all commercial aviation turbin fuel squarely within the taxing machinery of the aforesaid Chapter 13 and the fuel referred to by the petitioner as "Shell 640" has been considered typical of commercial aviation turbin fuel, and vice versa. This fuel is sold by a number of dealers, all of whom, including the petitioner, with all the facts concerning such fuel in their hands and control have voluntarily reported the sale and paid the tax on millions of gallons of such fuel Invariably the aviation companies who purchased this fuel from the dealers have likewise considered it motor fuel and have requested and received the refunds of motor fuel tax allowed under the aforementioned Chapter 13.

11. Under the terms of Section 58-1130 of the Code the

recovery sought by petitioner for the year 1958 is barred, as the application was not timely made.

Wherefore, your respondent prays that the petition filed against her be dismissed and petitioner's prayer be denied.

* * * * *

Received & filed 1962 Jun 8, Luther Libby, Jr., Clerk, By E. M. Edwards, D. C.

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NO. A-1808

ORDER

WHEREAS, the Commonwealth of Virginia has filed a motion to amend in certain respects Paragraph 7 of her answer, it is hereby

ORDERED that Paragraph 7 of the answer filed herein be amended by inserting the following after the first sentence in said paragraph, to-wit:

"If an assessment were made under Section 58-711 of the Code of Virginia as alleged, then the petitioner could have availed itself of the procedure provided in Section 58-689, Code of Virginia (1950). Having failed to do so, the relief sought is now barred."

Enter: 11/5/62

John Wingo Knowles
Judge

* * * * *

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* * * * *

NO. A-1808

ORDER

Whereas, Petitioner herein has filed a Motion to Amend in certain respects paragraph 5 of its Petition, it is hereby

ORDERED that paragraph 5 of the Petition filed herein be amended by inserting the word "Distilled" for the word "Evaporated" wherever the latter word appears in paragraph 5 of the Petition.

Dated: 11/5/62

Entered this:

John Wingo Knowles
Judge

* * * * *

page 24 }

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NO. A-1808

STIPULATION

It is hereby stipulated between the parties that the 1,709,797 gallons of Shell 640 Kerosene sold and delivered to Piedmont Aviation, Inc., at Lynchburg, Norfolk, Roanoke and Richmond, Virginia, during the period November 1, 1958 through March 30, 1960, were subjected to regular distillation tests administered in accordance with the standard method for distillation of gasoline, naphtha, kerosene and similar petroleum products (ASTM Designation D-86), and showed the following results:

IBP, 345 degrees Fahrenheit.

10% Distilled (Recovered) between 350-400 degrees Fahrenheit.

20# Distilled (Recovered) at a maximum of 392 degrees Fahrenheit.

50% Distilled (Recovered) at a maximum of 450 degrees Fahrenheit.
90% Distilled (Recovered) at a maximum of 500 degrees Fahrenheit.
95% Distilled (Recovered) at a minimum of 465 degrees Fahrenheit.
EP, maximum 525 degrees Fahrenheit.

page 25 } In so stipulating, the defendants reserve their objections to the materiality and relevancy of these test results and, further, reserve their contention that, irrespective of these test results, the said 1,709,797 gallons of Shell 640 Kerosene is included within the meaning of the term "aviation fuel" as contemplated in Chapter 13, Title 58, Code of Virginia (1950) in force when the tax on said fuel was paid.

Dated: October 31, 1962.

* * * * *

Received & filed 1962 Nov 5, Luther Libby, Jr., Clerk, By E. M. Edwards, D. C.

page 26 }

* * * * *

NO. A-1808

FINAL ORDER

This case was regularly matured, docketed, heard by the Court and argued and briefed by counsel.

Upon mature consideration whereof, and it appearing to the Court that final judgment should be entered for the petitioner against the defendants,

It is ADJUDGED and ORDERED that the petitioner recover of the defendants the sum of Thirty-seven Thousand Thirty-two Dollars and Ninety-six Cents ($37,032.96), to all of which action the defendants, by counsel, object and except. On motion of the defendants, by counsel, the Court grants a stay of execution to this judgment for a period of 60 days from the date hereof in order to permit the defendants to apply to the Supreme Court of Appeals of Virginia for a writ of error herein, if they be so advised.

And it is further ADJUDGED and ORDERED that the Court's memorandum of opinion dated October 16,
page 27 } 1967, be made part of the record herein.

Dated: November 30, 1967.

Enter this:

John Wingo Knowles
Judge

I ask for this:
Joseph C. Carter, Jr.
Counsel for Petitioner

Seen and objected to:
D. Gardiner Tyler
Counsel for Defendants

* * * * *

page 35 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court
of the City of Richmond:

The Commonwealth of Virginia, acting by and through the State Tax Commissioner, the Commissioner of the Division of Motor Vehicles, one of the Commissioners of the State Corporation Commission and the Attorney General of Virginia, hereby give notice of appeal from the final judgment entered in this case on November 30, 1967, and sets forth the following assignments of error:

1. That the Court erred in assuming jurisdiction of this case under Section 58-1130 of the Code of Virginia (1950).

2. That the Court erred in failing to rule that the Shell Oil Company could have timely proceeded under Section 58-689 of the Code to test the validity of the determination of the Commissioner of the Division of Motor Vehicles that it was required to file the reports and pay the taxes enumerated in Chapter 13 of Title 58 of the Code, and not having

done so, is now barred from recovering the alleged erroneous taxes which it voluntarily paid.

page 36 } 3. That the Court erred in overruling the defendant's demurrer to the petition filed by the Shell Oil Company seeking a refund of the taxes on aviation fuel.

4. That the Court erred in holding that the Shell Oil Company was an aggrieved person within the meaning of Section 58-1130 of the Code, and thereby had the right to institute and maintain an action at law under said section although it had no pecuniary interest in the funds it sought to collect from the Commonwealth as refunds.

5. That the Court erred in holding that the aviation fuel (upon which the taxes were paid) was not taxable under the statutes made and provided.

6. That the Court erred in holding that there had been an assessment of the motor fuel taxes against the Shell Oil Company when as a matter of fact said company paid the taxes voluntarily after being informed by the Division of Motor Vehicles that it was required to file reports, including such taxes.

7. That the Court erred in quashing the notice to take depositions of the Honorable Robert F. Baldwin who was Chairman of the Commission created by the General Assembly of Virginia in 1950 to study the gas and use fuel tax statutes and make recommendations as to necessary changes in said statutes, and who subsequently was one of the patrons of the bill which amended Section 58-687 of the Code in 1952, the said Baldwin residing more than one hundred miles from the city of Richmond.

8. That the Court erred in rendering judgment against the defendants.

Received & Filed Jan 16 1968

Luther Libby, Jr., Clerk

By Jean K. Martin, D.C.

* * * * *

Records Nos. 6985-6986

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CASES NOS. A-1803 and A-1808

MEMORANDUM OF OPINION

The Court has carefully studied the evidence adduced in these two proceedings, which have throughout been considered together, though not technically consolidated. Further, the memoranda and minutes of oral argument of counsel have been reviewed and re-reviewed at length. The Court is of the opinion that the "petitioner," Shell Oil Company, is entitled to the relief sought and will so order.

The principal issue presented is whether in the years 1957, 1958, 1959, and the first three months of the year 1960 the petitioner, as a "dealer" engaged in the business of selling "Shell 640 Kerosene" for use in Fairchild and Vicount Turbine Propeller (Turbo-prop) aircraft, is entitled to relief in the form of a refund of taxes paid to the Commonwealth on such fuel sold to and used by Piedmont Aviation, Incorporated, and Capital Airlines, Incorporated, respectively. In order to determine this basic issue the Court is required to resolve certain sub-issues, specifically, whether "Shell 640 Kerosene" is an "aviation fuel" within the purview of § 58-687 of the Code of Virginia, prior to its amendment in 1962; whether the tax on aviation is a "license" tax within the sense of § 58-1130 of the Code, and whether the petitioner is a corporation "assessed" and "aggrieved" under the provisions of the latter section. These points will be discussed *seriatim* below.

It is argued on behalf of the defendants that the administrative interpretation by the Commissioner of the Division of Motor Vehicles of §§ 58-687 and 58-711 was never
page 33 } challenged by the petitioner until December, 1959, when Shell filed its first petition for refund with the State Department of Taxation and that the propriety of the Commissioner's acceptance of Shell's monthly reports and tax payments were never questioned, nor was an appeal taken to this Court pursuant to § 58-689 of the Code. The evidence reveals that as far back as April 13, 1955, inquiry was made of the Division when Shell contemplated distribution of kerosene as jet fuel and that no objection to the Commissioner's interpretation of the statute in question was raised thereafter (Petitioner's Exhibits 9 and 10). But the Court does

not agree that any "interpretation" of the statute was ever necessary, since the language of the then § 58-687 is clear and not ambiguous. *Winston* v. *Richmond,* 196 Va. 403, 407-8; *Richmond* v. *Henrico,* 185 Va. 176, 189.

The definitions of "motor fuel" and of "aviation fuel" must be read together because the plain language of § 58-687 (3) reads:

" 'Aviation fuel' means a motor fuel designed for use in the operation of aircraft, and sold or used for that purpose."

Clearly, to be "aviation fuel" the fuel must first be "motor fuel." To find out what is deemed to be "aviation fuel," one must determine first what is deemed to be "motor fuel."

We find in § 58-687(2) that "motor fuel" for the purposes of the motor fuel tax is "gasoline," regardless of classification, and any liquid commonly and commercially used in internal combustion engines which, when properly tested, falls within the boundaries set out in the statute, to-wit:

"...not less than 10% distilled (recovered) below 347° F. (175° C.) and not less than 95% distilled (recovered) below 464° F. (240° C.); . . ."

The stipulation entered into between the parties to this proceeding (Petitioner's Exhibit 1) shows that the "Shell 650 Kerosene" in question did not test out to be within the statutory limits for a liquid fuel covered by Chapter 13, Title 58, of the Code. Further, the General Assembly recognized the gap revealed by these proceedings when it amended § 58-687 at its 1962 session (Acts of Assembly, 1962, Chapter 249) to eliminate all reference to "any liquid" which met
page 34 ! the standard method of test for distillation within certain limits and defined "motor fuel" as:

"All products commonly or commercially known, advertised, offered for sale, sold or used as gasoline including casinghead or natural gasoline and all other types of additives when mixed or blended into gasoline, regardless of their classifications or uses."

The next bone of contention between the parties lies in their differing approaches to the evidence and the law with respect to the actions of Shell to recover the sums paid in to the Commonwealth which were not, in the view of the Court, actually due to the Commonwealth. Shell, in order to

avoid penalty, chose to file its reports, pay the taxes and then, in the case of fuel sold Capital Airlines, proceed under §§ 58-1118 and 58-1130 of the Code, having first filed by registered mail on December 23, 1959, and June 1, 1960, petitions for refund with the State Department of Taxation on fuel sold to Capital Airlines (Petitioner's Exhibits 2 and 5) and having been informed by the Director of the Division of Aeronautics of the State Corporation Commission that a follow-up letter of April 1, 1960 (Petitioner's Exhibit 3) had been forwarded from Taxation to Motor Vehicles to Corporation Commission (Petitioner's Exhibit 4). Thereafter, the petitioner's Tax Department was advised by counsel for the Corporation Commission that all motor fuel taxes and refunds were handled by the Commissioner of the Division of Motor Vehicles (Petitioner's Exhibit 7). Each of the two petitions for refund had been forwarded by the State Department of Taxation to the Division of Motor Vehicles (Transcript, p. 64). A similar petition for refund was filed by Shell in the case of fuel sold to Piedmont Aviation on December 28, 1961.

The petitioner urges that the tax on aviation fuel is a license tax and that its compliance with § 58-1118 of the Code by filing an application for refund with the Department of Taxation on December 29, 1959, had the effect of suspending the two-year period prescribed by § 58-1131 during which judicial relief from erroneous assessment of motor fuel taxes for the years 1957 and 1958 could be obtained in the case of Capital Airlines. With re-
page 35 } spect to taxes measured by deliveries to Capital Airlines in 1959 and the first three months of 1960, the assertion is made that the institution of the proceeding designated A-1803 on August 31, 1961, complied with that statute. The Piedmont Aviation case, A-1808, was instituted on December 29, 1961, after a petition for a refund was presented to the Department of Taxation on December 28, 1961. Hence, the petitioner concedes that, at best, it is entitled only to refund of taxes erroneously assessed in the year 1959 and the first three months of 1960 in the Piedmont proceeding.

After careful study of the authorities cited by counsel for the parties, the Court is of the opinion that the tax imposed by § 58-711, as it applies in these proceedings, and "assessed" in accordance with the plain language of that Section, is a State license tax, one purpose of which is to require dealers in aviation fuel or users of air space and air terminal facilities to foot the bill for construction and maintenance thereof

in return for the privilege of using them. It is collected from a dealer in the form of a tax for the privilege of engaging in the particular business of distributing aviation fuel, even though the dealer passes on the amount of the tax to the ultimate consumer. The cases cited by the petitioner, in particular, *State* v. *Springfield,* Mo. , 332 S. W. (2d) 942, 947; *Pauley* v. *California,* (9th Cir.), 75 F. 2d 120, 127; *Amos* v. *Gunn,* 84 Fla. 285, 94 So. 615; *State* v. *Silver Bow Refining Co.,* 78 Mont. 1, 252 P. 301, 306, and *Red Arrow Garage & Auto Co.,* v. *Carson City,* 47 Nev. 473, 225 P. 487, 488, are deemed apposite by the Court in reaching this conclusion.

The defendants argue that these taxes are not "assessed," but merely levied and that neither § 58-1118 nor § 58-1130 and 58-1131 are applicable to afford relief to the taxpayer Shell. They state that the only possible "assessment" of a motor fuel tax occurs under § 58-726 when the dealer fails to report and the Commissioner then determines the number of gallons of fuel in question. It is difficult for the Court to distinguish between an initial determination and
page 36 } "assessment" by the Commissioner and a proper filing of reports followed by an audit by the Commissioner's agents. Although the amount of the tax is based on the number of gallons sold and not on the value of the fuel, when it becomes necessary for the Commissioner to audit the books of the taxpayer, he certainly exercises a quasi-judicial function in determining the ultimate fact, i.e., the number of gallons sold and delivered or used in this State.

In passing, it may be well to dispose in writing of the contention of the defendants that the Court is without jurisdiction to entertain these proceedings under § 58-1130 of the Code for the reason that Shell does not maintain a Richmond office wherein claims against it may be audited, settled and paid. This was the subject of the defendants' "Motion to Strike" filed on June 8, 1962.

The evidence clearly reveals and the Court finds that Shell maintains a District Sales Office at 1004 Thompson Street in the City of Richmond, in addition to the Registered Office at 10 South Tenth Street in that city. Transcript, pp. 25-27. Further, the Division of Motor Vehicles has continually seen fit to have its agents conduct the periodic audits of the books and records of fuel sales of Shell in Virginia in Baltimore, Maryland, at the Division Office at 200 East Joppa Road. Transcript, pp. 28-30. The Court holds that this contention is without merit.

The defendants, although they announced at a pretrial conference on December 11, 1962, that they withdrew their motions for summary judgment previously filed, argue that Shell is not "an aggrieved person" within the purview of § 58-1130. This argument is advanced despite the obvious liability placed upon a dealer by § 58-721 upon failure to file reports or to pay the taxes assessed. They assert that Capital Airlines and Piedmont Aviation are the only proper petitioners in these proceedings.

Under the Court's view of the situation, the tax is assessed against Shell, not against the consuming airlines. When the pertinent statutory provisions imposing the tax page 37 } and providing for collection are given a liberal and practical construction so far as the taxpayer is concerned, and a strict construction against the State (*Bott* v. *Com.,* 187 Va. 745, 751), the Opinion of the Attorney General, beginning on page 230 of the 1952-53 volume of his reports, takes on added weight He states:

"This act [(58-712.1 of the Code) leaves no doubt that it was the intent of the legislature that Section 58-911 imposed a tax on a dealer in gasoline and not upon the consumer."

Section 58-711 was not thereafter amended until 1960 and then only in a manner which had no effect upon the thrust of the opinion. It follows that the petitioner falls within the category of those "aggrieved" by the erroneous assessments.

As to whether Shell would be unjustly enriched by receipt of the refunds sought, it seems obvious that at the very least a trust in favor of Capital Airlines and Piedmont Aviation would be impressed upon the sum repaid by the Commonwealth to Shell. The records of sales and deliveries to each airline are in hand and the Court is in a position to require that such repayment be made by Shell even if Shell were not willing so to do. (See Transcript, pp. 31 and 32).

The final issue remaining is whether Shell is entitled to recover back the taxes paid for the years 1957, 1958, 1959 and the first three months of 1960 in the case of Capital Airlines and for the year 1959 and the first three months of 1960 in the case of Piedmont Aviation. As set out above, in order to do this Shell must be able to rely upon the filing of petitions for refund with the State Department of Taxation by registered mail on December 23, 1959 and June 1, 1960, the filing of the petition with the Court on August 31, 1961, in the case of Captial Airlines and the filing of the petition on December 29, 1961, in the case of Piedmont Aviation.

In the opinion of the Court the filing of the two petitions which instituted these proceedings in the Court was, in each case, sufficient to permit judicial relief pursuant to § 58-1130 of the Code. The question with respect to the petitions for refund received by the Department of Taxation and page 38 } whether the filing of these petitions tolled the two-year statute of limitations in accordance with the second sentence of § 58-1131, presents more difficulty, however.

The plain language of § 58-1118 permits any person aggrieved by an assessment of a State license tax to apply for relief to the Department of Taxation and the second sentence of § 58-1131 expressly brings such applications within the penumbra of the two-year statute set out in § 58-1130. Although counsel for Shell intimate that evasive administrative tactics were employed, the Court is sure that whatever delay ensued in acknowledgment of receipt of the applications resulted only from a firm difference of opinion as to the application and effect of the law.

The Court feels that the approach adopted by counsel for the petitioner, beginning on page 18 of its Brief, is correct, both from a legal and from an equitable standpoint. While the State Tax Commissioner is generally recognized as an eminent authority on all questions of Virginia tax law, the Court is constrained on this occasion to disagree. If Shell could not pursue the course which it followed, it would seem that its only remedy at law would have been by way of declaratory judgment and then it may have subjected itself to pecuniary loss by virtue of not being able to compete with other suppliers of fuel for the aircraft using kerosene fuel pending determination of the case.

The Court finds that the petitioner is entitled to refund of $34,835.68 in Case No. A-1803, and $37,032.96 in Case No. A-1808. The amount due in Case No. A-1803 is to be paid over by Shell to Capital Airlines, Incorporated, and the amount due in Case No. A-1808 is to be paid over by Shell to Piedmont Aviation, Incorporated, in accordance with Shell's agreement so to do.

Counsel are requested to prepare, endorse and submit for entry appropriate sketches for a final order in each case. The Court expresses its appreciation for the assistance rendered by counsel in their excellent briefs and argument.

John Wingo Knowles
Judge

October 16, 1967

C. H. Lamb

CASE NOS:

A-1803
A-1808

The deposition of C. H. LAMB, COMMISSIONER, Division of Motor Vehicles, taken before Linda L. Dean, Notary Public in and for the State of Virginia at Large, on the 17th day of April, 1963, beginning at eleven o'clock a.m., in the office of the Assistant Attorney General, at the Division of Motor Vehicles Building, 2220 West Broad Street, Richmond, Virginia, to be read in evidence on behalf of the defendant, having been taken pursuant to notice hereto attached.

APPEARANCES:

MR. JOHN J. ADAMS,
Counsel for petitioner

MESSRS. A. R. WOODROOF and
D. GARDINER TYLER,
Counsel for defendant

* * * * *

Dep.
4/17/63
page 3 } HONORABLE C. H. LAMB, being duly sworn, deposed and said as follows:

DIRECT EXAMINATION

By Mr. Woodroof:

Q. Please state your name and occupation.

A. C. H. Lamb, Commissioner of the Division of Motor Vehicles, Commonwealth of Virginia.

Q. Mr. Lamb, would you state for the Court why you will not be present in the Circuit Court of the City of Richmond at the Shell Oil case hearing on April 22, 1963?

A. I have an official appointment of long standing that will require my absence from the City of Richmond.

Q. Mr. Lamb, how long have you continuously held the position you now hold?

A. Since December of 1952.

Q. Before becoming Commissioner, what position did you hold?

A. I was Deputy Commissioner from 1948 to 1952.

Dep. 4/17/63 page 4 }

Q. Then you were Deputy Commissioner during 1952, is that correct?

A. Up until December 29, I believe it was, 1952. It was practically through 1952.

Q. As Deputy Commissioner and later as Commissioner, did you follow the enactment of all legislation pertaining to the operation of the Division of Motor Vehicles, including the legislation involving the legislation of the Motor Fuel Tax Act, Chapters 13 and 14 of Title 58 of the Motor Vehicle Code of Virginia?

A. I attended numerous sessions of the various committees of the General Assembly and, as long as I was Deputy Commissioner, I advised the Commissioner of what went on, and if he requested my opinion, I expressed my opinion as to the best course to follow or how it would affect this Division from an administrative standpoint. Of course, after I became Commissioner, I had the double duty of attending and also determining action.

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Dep. 4/17/63 page 5 }

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Dep. 4/17/63 page 6 }

Q. (By Mr. Woodroof) The question was, as Commissioner of the Division of Motor Vehicles, what are your duties relative to the administration of the Motor Fuel Tax Act and the Special Fuels Tax Act?

A. It is the responsibility of the Commissioner of Motor Vehicles, and his sole responsibility, to collect all taxes, enforce the provisions and administrate the Act, as defined in those particular Chapters, in person or through his deputies or assistants.

Q. Is the term "Commissioner" defined in either the Motor Fuel Tax Act, Chapter 13 of Title 58, or the Special Fuels Tax Act, Chapter 14 of Title 58 of the Code of Virginia?

A. It is defined in both Chapters.

Q. What definition is given?

A. It is defined as the "Commissioner of Motor Vehicles, Commonwealth of Virginia."

Q. All right, sir. Is there any reference to the State Tax Commissioner in either Chapter 13 or 14 of Title 58?

A. No reference to the Tax Commissioner in either Chapter.

Q. To your knowledge, has the State Tax Commissioner ever authorized a refund on taxes collected under the Motor Vehicle Tax Act, Chapter 13, Title 58 of the Code of Virginia?

Dep. 4/17/63 page 7

A. So far as I am advised, he has never made any ruling or taken any action under these Chapters.

Q. Are you familiar with the administrative interpretation which was placed upon the provisions of Chapter 13 of Title 58, Code of Virginia—for instance, the Motor Fuel Tax Act as interpreted by your Bureau of Gasoline Tax, from 1948 to 1960, in reference to the types of fuel tax thereunder?

A. I am fully familiar with the interpretation. It remained the same from 1948 to 1960.

Q. Directing your attention to the Motor Fuel Tax Act and, more particularly, to Section 58-687 and 58-711, as these Sections appear after the amendment of Section 58-687 in 1952, can you state whether or not the term "all motor fuel" in Section 58-711 was interpreted to include any fuel designed for use in the operation of aircraft?

A. Yes, the interpretation was that the definition "aviation fuel" covered any type of fuel used to propel an aircraft.

Mr. Adams: This was the interpretation by your Department?

The Deponent: Yes, that is correct, sir.

Q. (By Mr. Woodroof) Mr. Lamb, I hand you a copy of the Motor Fuel Tax Act and, particularly, invite your attention to Section therein recorded as 58-730.1, entitled "Restricting purposes for which taxes levied under Sections 58-628, 58-711 and 58-744 may be expended," and I would ask you to read that Section.

Dep. 4/17/63 page 8

A. "58-730.1. Restricting purposes for which taxes levied under Sections 58-628, 58-711 and 58-744 may be expended. Notwithstanding any other provision of law, no portion of the revenue derived from the taxes levied under Sections 58-628, 58-711 and 58-744 of the Code of Virginia, as amended, except upon aviation fuel, shall be expended for any purpose other than the purposes hereinafter set forth:

(a) The construction and reconstruction of highways, streets, bridges, tunnels and ferries and the maintenance thereof;

(b) The acquisition of land, bridges, tunnels and ferries required therefor:

(c) The purchase of equipment required therefor;

(d) The employment of such personnel as may be required therefor;

(e) Structures required in connection with the foregoing;

(f) Expenditures directly and necessarily required for the foregoing purposes including retirement of revenue bonds and no other reason.

Dep. 4/17/63 page 9

As used above, the word "revenue" shall be construed to include only net revenues remaining after the making of any refunds for nonhighway use of motor fuel or fuels, as defined in Sections 58-687 and 58-732, as now provided by law, and shall not be construed to mean any revenue from taxes levied upon aviation fuel.

The State Comptroller shall not issue any warrant on such revenues in violation of the provisions of this section. (1954, c. 226.)"

And, the footnote:

"The number of this section was assigned by the Virginia Code Commission, the 1954 act having assigned no number."

Q. Mr. Lamb, would you state whether or not the contents you have read in this paragraph coincide with your administrative view during this period in question, as to aviation fuel, and explain why or why not?

A. I feel that it does, in that it points out a difference between motor fuel and aviation fuel. It mentions aviation fuel, that this doesn't apply to aviation fuel, in two places. That makes a distinction.

Q. Between what, you mean?

A. Between motor fuel and aviation fuel.

Dep. 4/17/63 page 10

Q. In using that term "motor fuel," does it state "as herein defined," or does it just say "motor fuel"?

A. It says, "motor fuel or fuels, as defined."

Q. In other words, Mr. Lamb, you say that it makes a difference between aviation fuel and motor fuel, as defined in this Chapter?

A. That is as I interpret it, yes, sir.

Q. Under said Chapter 13 of Title 58, as administered by the Division of Motor Vehicles from 1952 to 1960, will you state whether or not taxes were paid by the dealers in motor fuel on all types of fuel used in the operation of aircraft, regardless of the distillation properties of said fuel?

A. The taxes were paid on all types of fuel sold for use in propelling aircraft, that is correct.

Q. In other words, your Department would not consider the definition of "motor fuel" in Paragraph (2), Section 58-687 as restricting the imposition of the tax on fuel therein defined, but you considered that the tax was to be imposed on all fuel used or designed for the use of aircraft, is that correct?

A. That is correct, sir. We felt that the definition of aviation fuel broadens the meaning or definition, as given for motor fuel.

Dep. 4/17/63 page 11

Q. Can you describe exactly how the tax on aviation fuel was collected?

A. The dealers in aviation fuel filed a report and a schedule giving the number of gallons sold, the opening and closing inventory and attached thereto a remittance covering the tax liability.

Q. Is the filing of a report and the making of payment by the dealer and acceptance by the Commissioner of the funds tendered considered an assessment under the Act?

A. No, sir, it is not.

Mr. Adams: I object to that question and the answer on the ground it is a conclusion of law by the witness, not a statement of fact.

Q. (By Mr. Woodroof) What recourse do you have when the dealer fails or refuses to file his reports or pay the related taxes?

A. The Commissioner can make an assessment, based on any information available, to determine the amount of gallonage and the amount of tax.

C. H. Lamb

Q. Did you, during the period January, 1956, through March, 1960, ever have occasion to make such an assessment against Shell Oil Company for failure to pay the tax on aviation fuel?

Dep. 4/17/63 page 12 } A. Such an assessment was never necessary, as the reports and payments were made timely.

Q. Do you know whether or not the payment of this tax by the Shell Oil Company was voluntary or otherwise?

A. It was voluntary. There was nothing to indicate anything else, as far as the reports and the payments were concerned.

Mr. Adams: I object to that question and that answer on the grounds that it again is a conclusion of law as to the voluntary payment of the tax assessed.

Q. (By Mr. Woodroof) Was it, at any time during the period January, 1956 through March, 1960, necessary to make demand for these taxes?

A. It was not ever necessary to make a demand for these taxes. I gather you are speaking of the same taxes there?

Q. Yes, Shell Oil Company.

A. Yes.

Q. Under what conditions were these taxes paid by the Shell Oil Company?

A. They were paid voluntarily, as I have described, by filing of the necessary reports, schedules and the attachment thereto of the remittance covering the tax liability voluntarily, as I have stated.

Dep. 4/17/63 page 13 } Q. Who bears the ultimate burden of paying the tax on aviation fuel and all motor fuel?

A. The user of the fuel.

Q. What evidence, if any, do you have in your records that the Shell Oil Company collected the tax on this aviation fuel?

A. Delivery tickets that are filed by the user when refunds are applied for. That delivery ticket carries the information as to the tax that was paid and the price that was passed on to the user.

Q. As I understand it, Mr. Lamb, you made all lawful refunds to the users upon the users' proper certification that the tax had been paid by said user?

A. The refunds are made on application provided by this office, accompanied by the necessary delivery tickets, in time as provided by the Statute.

Mr. Adams: Just a question here. The word "lawful" was used. That refers to the refunds authorized directly under the Motor Fuel Tax Act? Those are the ones to which you you are referring?

The Deponent: That is correct.

Dep.
4/17/63
page 14 } Q. (By Mr. Woodroof) According to the petition filed in Case No. A-1803, a petition for refund of this tax was filed with the Department of Taxation on December 23, 1959, which petition was forwarded to the Division of Motor Vehicles on December 29, 1959 by the Department of Taxation. Prior to December 29, 1959, was there any protest or complaint made by the Shell Oil Company in paying this tax on the product known as Shell 640 Kerosene?

A. As I have stated before, the payments and reports were made voluntarily and I was not advised of any protest being made by the Shell Oil Company.

Q, Thereafter—that is, after December 29, 1959, was any protest or complaint made by the Shell Oil Company on the payment of this tax?

A. Again, as far as I have been advised, all reports and payments were made voluntarily and there was no protest made by the Shell Oil Company.

Q. What disposition did you make of the funds collected on the aviation fuel?

A. The funds collected from the tax on the sale of aviation fuel are deposited in the Special Fund, as provided in 58-730, and that Section also carries the information as to how these funds shall be used—for the promotion of aviation and the construction or re-construction of airfields, I believe, aids to aviation.

Dep.
4/17/63
page 15 } Q. Is there any other statement that you would wish to make at this time in connection with this subject, Mr. Lamb?

A. I can't think of any further statement I can make at the present time that would be helpful.

* * * * *

C. H. Lamb

CROSS EXAMINATION

Dep.
4/17/63 By Mr. Adams:
page 16 } Q. Commissioner Lamb, I hand you first a letter dated January 16, 1959, addressed to Mr. Charles L. Briggs of the Division of Motor Vehicles and signed by Mr. W. C. Boyd of Gulf Oil Corporation, which I ask you if you can identify as a copy of a letter in your files which you have kept in the ordinary course of business? Can you identify it as a copy of such letter?

A. I can identify it as a copy of a letter from the Gulf Oil Corporation received by this Division.

Q. I next hand you a letter dated January 21, 1959 to Gulf Oil Corporation from C. H. Lamb, Commissioner, by Charles L. Briggs, Director, and ask you if you can identify that as a letter kept in the ordinary course of business in your files?

A. I can identify that as a letter written by this Department and kept in our files in the ordinary course of business.

Q. I next hand you a letter dated January 23, 1959, to Mr. Charles L. Briggs, Director, Division of Motor Vehicles, from Mr. W. C. Boyd of Gulf Oil Corporation and ask you if this is a copy of a letter kept in the ordinary course of business in your files?

A. I can so identify this letter.

Dep.
4/17/63 Q. I next hand you a letter dated June 9, 1959, addressed to Mr. Charles L. Briggs, Division of
page 17 } Motor Vehicles, from Mr. Macon M. Arthur, Attorney for Capital Airlines, and ask you if this is a copy of a letter kept in your files in the ordinary course of your business?

A. I can so identify this letter.

Q. I next hand you a letter dated June 17, 1959, addressed to the attention of Mr. Macon M. Arthur, from C. H. Lamb, Commissioner, over the signature of Charles L. Briggs, and ask if you can identify this as a copy of a letter kept in the ordinary course of business in your files?

A. I can so identify this copy.

Q. I next hand you a letter dated October 28, 1959, to Mr. Charles F. Briggs, Division of Motor Vehicles, from Mr. H. J. Murtha, Director of Taxes for Capital Airlines, and ask you if you can identify this as a copy of a letter kept in your files in the ordinary course of business?

A. I can so identify this copy.

Q. I next hand you a letter dated November 9, 1959, directed to Mr. H. J. Murtha, Director of Taxes, Capital Airlines, by Mr. Charles L. Briggs and ask if you can identify this as a copy of a letter kept in the ordinary course of business in your files?

A. I can so identify this copy.

Dep. 4/17/63 page 18

Q. I next hand you a letter dated November 12, 1959, to Mr. Charles L. Briggs, Director, Bureau of Gasoline Tax, Division of Motor Vehicles, signed by Mr. H. J. Murtha, Director of Taxes of Capital Airlines and ask if you can identify this as a copy of a letter kept in your files in the ordinary course of business?

A. I can so identify this copy.

Q. I next hand you a letter dated November 18, 1959, to Mr. H. J. Murtha, Director of Taxes, Capital Airlines, signed by Charles L. Briggs, and ask if you can identify this as a copy of a letter kept in your files during the ordinary course of business?

A. I can so identify this copy.

Q. I next hand you a letter dated July 28, 1960, to the Commonwealth of Virginia, Division of Motor Vehicles, to the attention of Mr. C. H. Lamb, Commissioner, signed by Mr. J. F. Legg, Supervisor of Property and Excise Division, General Tax Department of Shell Oil Company and ask if you can identify this as a copy of a letter kept in your files in the ordinary course of business?

A. I can so identify this letter.

Q. Lastly, I hand you a letter dated August 9, 1960 to Mr. J. F. Legg, Supervisor, Property and Excise Division, General Tax Department, Shell Oil Company, signed by yourself, C. H. Lamb, and ask if you can identify this as a copy of a letter kept in your files in the ordinary course of business?

Dep. 4/17/63 page 19

A. I can so identify this copy.

Mr. Adams: And I now ask the reporter if she would take each one of those letters and signify them in the order in which they have been identified, as Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

Note: The letters were so marked for identification.

C. H. Lamb

Mr. Adams: Without waiving any of my objections as to the admissibility, relevancy, competency or materiality of any of the testimony of Commissioner Lamb on his interpretation or construction of the Motor Fuel Tax Laws or the Special Fuel Tax Laws, which objection I again renew, I wish to ask Commissioner Lamb certain questions dealing with the interpretation of this Act, these two Acts, which he has already interpreted.

Mr. Woodroof: I would like to renew my objection at this time as calling for a conclusion of law from the Commissioner, the questions of interpretation of the Act.

Dep. 4/17/63 page 20 } Mr. Adams: Do I understand you correctly, that you object to interpretation as a conclusion of law?

Mr. Woodroof: If that is what you are going to ask him.

Mr. Adams: Does that go to your own questions regarding the interpretation of the Act?

Mr. Woodroof: As to your questions, of course.

Q. (By Mr. Adams) Commissioner, I hand you a copy of the Motor Fuel Tax Laws of this State and ask you first, does Section 58-687 (2) of Article 1., Chapter 13, Title 58 of the Code of Virginia as it existed between January 1, 1956 and March 30, 1960, define the term "motor fuel?"

A. It does.

Q. Does this definition provide that in order for any fuel other than gasoline to constitute motor fuel, it must meet certain distillation tests specified in that Section?

A. It provides what "motor fuel" shall mean, and further provides that it shall meet certain distillation standards.

Dep. 4/17/63 page 21 } Q. That it either has to be gasoline or meet these distillation requirements in order to be a motor fuel?

A. I am not positive it restricts to gasoline, and then only these others. It says, "All products commonly or commercially known or sold as gasoline, including casinghead and absorption or natural gasoline, regardless of their classifications or uses." And then, it provides for the standards it has to reach for a motor fuel as defined in (2). Have I answered your question?

Q. Again, the definition of "motor fuel" contained in this Section states that, in order to be motor fuel, it must either

be gasoline as defined in that Section, and must meet certain distillation requirements?

A. That is correct.

Q. Now does this term "motor fuel" have the same meaning throughout Article 1., Chapter 13, Title 58 of the Code of Virginia?

A. It does not.

Q. You say it does not, despite the fact that Section 58-687, entitled "Definitions" states that, "The following words, terms and phrases used in this chapter are for the purpose hereof defined as follows:?"

A. That is correct.

Dep. 4/17/63 page 22 } Q. So, even though that Code provision states that the terms defined, including "motor fuel," which is defined, have the same meaning throughout the Chapter, you say that they don't, is that correct?

A. That is correct. It is my interpretation that "Aviation fuel," (3), broadens the meaning of motor fuel.

Q. Despite the fact that aviation fuel, as defined, states that it means a motor fuel?

A. That is correct, in spite of that.

Q. How did you reach this interpretation?

A. By the wording of the definition, "Aviation fuel means a motor fuel designed for use in the operation of aircraft, and sold or used for that purpose." I have interpreted that to mean any grade of motor fuel that propels an aircraft.

Q. So, if an airplane could fly by water, it would be taxed under that Act?

A. If it could be considered a fuel.

Q. Well, if it propels the plane so it flies through the air, if it is water, it would be taxed under that Act?

Mr. Woodroof: I object. You are getting off into some mighty technical questioning there.

Dep. 4/17/63 page 23 } Q. (By Mr. Adams) Will you answer the question.

A. I will answer again, if it was considered a fuel.

Q. Anything that propels the plane through the air would be considered a fuel, would it not?

A. I think we are getting into a field now that we know

very little of. We are getting into fuel and energy. There could be a difference.

Q. All right, then, assuming that a fuel was used to propel a plane through the air and that, in fact, it did not meet the requirements of the definition of motor fuel contained in 58-687, it would have still been subject to the Motor Fuel Tax as it existed under the laws between January 1, 1956 and March 30, 1960?

A. That was our interpretation.

Q. This was the interpretation placed upon this Act in the letter introduced as Plaintiff's Exhibit No. 2, dated January 21, 1959, sent by this office to Mr. W. C. Boyd of Gulf Oil when they inquired as to the applicability of the Motor Fuel Tax Laws to certain jet turbine aviation fuel they proposed to sell in this State, is that correct?

A. May I ask what interpretation?

Dep. 4/17/63 page 24

Q. That it applied irrespective of any distillation test? It applied regardless of the fact the motor fuel in question did not meet the statutory distillation test requirements?

Mr. Woodroof: Excuse me—Mr. Adams, you are asking questions about a letter that was written, is that correct?

Mr. Adams: That is correct. It is dated January 21, 1959.

Mr. Woodroof: I would like to suggest that Commissioner Lamb read that letter. The answer is right in the letter.

Q. (By Mr. Adams) Would you read that letter?

A. Addressed to Gulf Oil Corporation, P. O. Box 8056, Philadelphia 1, Pennsylvania.

"Attention: Mr. W. C. Boyd

Gentlemen:

We have for acknowledgment your letter of January 16, with reference to the levy of motor fuel tax on jet turbine aviation fuel.

Although the fuel which you are now marketing does not come within the specifications of motor fuel as defined in the Act, aviation fuel is interpreted to mean any fuel, regardless of specification, which can be used to propel aircraft.

Dep. 4/17/63 page 25

The inclusion in the Act, Section 58-730, of the provision whereby the tax on aviation fuel shall be paid into the treasury of this State, for a special fund to defray the costs of the administration of the laws of this State relating to aviation and for the construction, maintenance and improvement of

airports and landing fields within this State, would necessarily provide for the levy of tax on all aviation fuels.
The entire purpose of this section of the Act would be completely defeated if in the future all aircraft were converted to use jet fuel.
Therefore, until such time when the collection of this tax is not required by law, such fuel must be reported and the tax paid thereon.

Yours very truly,
C. H. Lamb, Commissioner

By: Director
Bureau of Gasoline Tax"

And, that is a letter, I think, that was earlier identified as being signed by Mr. Charles L. Briggs.

Q. Is your position in the interpretation of this Statute the same as it was then, or has it changed? Is your interpretation of the Motor Fuel Tax Act the same today as it was then on January 21, 1959?

A. It is. Are you referring to the Act as it existed between 1948 and 1960?

Dep. 4/17/63 page 26

Q. That is correct.

A. Yes, my interpretation is the same now as it was then.

Q. That is to say, as said in this letter, that your broadening the interpretation of the Motor Fuel Tax Act to cover all aviation fuel is based upon Section 58-730?

A. My statement was that the definition of aviation fuel, in itself, served to broaden the definition of motor fuel, when applied to aviation fuel.

Q. Then the interpretation you place upon it is based upon additional grounds other than stated in this letter dated January 21, 1959, where you only relied upon 58-730?

A. No, I don't agree with that.

Q. Well, is that the only Section that you relied upon in that letter for your interpretation?

A. As stated before, this letter dated January 21 was written by Mr. Charles L. Briggs for C. H. Lamb, Commissioner, and in the second sentence, which reads, "Although the fuel which you are now marketing does not come within the specifications of motor fuel as defined in the Act, aviation fuel is interpreted to mean any fuel, regardless of specifica-

Dep. 4/17/63 page 27

tion, which can be used to propel aircraft," it is my opinion he was relying on the definition in 58-687, (3), that defines aviation fuel, "means a motor fuel designed for use in the operation of aircraft, and sold or used for that purpose."

Q. Which, as I understand it from you, would include water if water was a fuel?

A. If it could be considered a fuel.

Q. Now, Commissioner, in this letter, the last paragraph, as you have read it, and states that, "Therefore, until such time when the collection of this tax is not required by law, such fuel must be reported and the tax paid thereon," in regard to that paragraph, you have then taken the position, unequivocally, that all such taxes must be paid by any company selling in this State any fuel to propel aircraft of any kind?

A. That is correct, any fuel being sold that would come under the definition of aviation fuel. The reports would have to be made and the tax paid by any company selling it within the Commonwealth of Virginia.

Q. So, Commissioner, any protest made by any company, either before that time—that is, after 1952 and up to 1959 or thereafter, would have received the same answer as stated in this letter to Gulf Oil Corporation?

Dep. 4/17/63 page 28

Mr. Woodroof: I object to that, because we don't know whether any other company had the same fuel as Gulf Oil had, and we are talking about a type of Gulf fuel.

Mr. Adams: My question goes to any fuel which would propel aircraft, and the Commissioner has testified any fuel that would propel aircraft would be subject to the tax and, I assume, irrespective of who sold the fuel.

Q. (By Mr. Adams) Is that correct?

A. That is correct.

Q. If any company had not paid the tax on any fuel sold to propel aircraft in this State, they would have been subject to the penalty provisions stated in the Motor Fuel Tax Laws, would they not?

A. That is correct.

Q. So, a protest would have been futile, wouldn't it?

A. I think we would have to determine what form the protest was in before I could answer that question.

Q. Now, Commissioner, we have been talking about the

Motor Fuel Tax Law and the payment thereunder of tax on fuel used by airplanes, as it existed up until March 30, 1960. After that day, and up until the present, you now tax aviation fuel, including Shell 640 Kerosene, under a different Statute, "Special Fuels Tax Laws," do you not?

Dep. 4/17/63 page 29

A. I am not attempting to evade the question, but I don't know the formula for 640 Kerosene. Anything that doesn't come under the provisions of Chapter 13 will now fall under the provisions of Chapter 14. As far as the taxing of aviation fuel is concerned, I understand that this would not—this Shell 640 would not come under the definition now in Chapter 13. We are taxing it in Chapter 14.

Q. That is to say, that Shell 640 Kerosene then, is now taxed under Chapter 14, which is a Special Fuels Tax Act?

A. That is my understanding.

Q. As are similar such fuels sold by other airlines, commonly referred to as, probably the general classification would be jet turbine fuel?

A. I am not familiar with the trade names or technical terms, but I have heard it referred to as that.

Q. I now invite your attention again to the Code of Virginia, Chapter 14, entitled the "Special Fuels Tax"—

Mr. Woodroof: Excuse me. Will you state whether you are inviting his attention to the revised Code of Virginia or as it existed between 1956 and 1960?

Mr. Adams: That will come in the course of my question. I am going to have him read some amendments as enacted, and it will show.

Dep. 4/17/63 page 30

Q. (By Mr. Adams) In this Special Fuels Tax Act, does it not state that an amendment became effective on March 30, 1960?

A. It states, "The 1960 amendment, effective March 30, 1960, added paragraphs (3a) and (12) and made changes in paragraphs (4), (7), (7a), (8) and (9).

Q. One of the changes referred to therein is a change in paragraph (4). Would you look at this 1960 amendment and compare it with the law as it existed prior to that time, and read that portion of paragraph (4) of Section 58-732 which was added by this amendment?

C. H. Lamb

A. The portion that was added is as follows: "including all types of fuel used in any type of aircraft, rocket or similar device."

Q. And it is under this amendment that you, since March 30, 1960, taxed Shell 640 Kerosene?

A. It is under this provision that we tax all motor fuel not taxed under the provisions of Chapter 13, which, I understand, includes Shell 640.

Q. And that is because this entire Section, as amended, now reads—would you please read paragraph (4)?

Dep. 4/17/63 page 31

A. Paragraph (4) of 58-732, "Definitions" reads as follows: "(4) Fuels shall mean and include all combustible gases and liquids, used or intended for use in an internal combustion engine or motor for the generation of power to propel motor vehicles on the public highways including all types of fuel used in any type of aircraft, rocket or similar device, except such fuels as are subject to the tax imposed by chapter 13 (§ 58-686 et seq.) of this title."

Q. And it is under this Section that you have, since March 30, 1960, levied a tax upon Shell 640 Kerosene fuel, is that correct?

A. That is correct.

Q. Why is this so, since this provision states that it applies only to fuels which are not subject to the tax imposed by Chapter 13, which is the Motor Fuel Tax, and which you have stated covers the applicability of the tax on Shell 640 Kerosene?

Mr. Woodroof: I want to renew all of my objections all through here. You are talking about a revised Code of Virginia, whereas the allegations are all brought applicable to a period in which the Code was different from the way it is now, and interpretations were placed upon it in accordance with the Code as it then existed. You are now going into detail into the revised Code which, actually, has no application to this case, and I therefore renew all of my objections.

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Q. (By Mr. Adams) Would you answer the question?

A. The definitions were changed in Chapter 13, as well as certain changes being made in Chapter 14.

Q. Would you check and see in the Code and see when the changes were made in the Code in the definition of "motor

fuel" under Chapter 13 of the Motor Fuel Tax Act, and tell me if it was not until 1962 that such an amendment was made?

A. The notation says, "The 1960 amendment added subsection (11)"—which is not pertinent, which is "Used in this State" and has no bearing. The notation also says, "The 1962 amendment rewrote subsection (2)." That is, of Chapter 13 of Section 58-687.

Q. And that sub-paragraph (2) is a definition of "motor fuel" is it not?

A. That is correct.

Q. So, that Statute was not amended until 1962, is that correct?

A. Correct.

Dep. 4/17/63 page 33

Q. So, from March 30, 1960, until the 1962 amendment to the Motor Fuel Tax Act, which you have just read, under your interpretation of the Motor Fuel Tax Laws, as they existed between March 30, 1960 and until 1962, Shell 640 Kerosene should have been taxed under Chapter 13 and not Chapter 14, is that not correct?

A. I don't agree with that. Provisions had been made by the 1960 General Assembly session to tax it under 14.

Q. Your interpretation was that the Motor Fuel Tax Act, as enacted by the General Assembly during that same period, as it existed during that same period, would apply to 640 Kerosene fuel, is that not correct?

A. My interpretation, as stated, was up to 1960. I made no reference between 1960 and 1962.

Q. But the same Act existed during that time, did it not, until it was amended in 1962?

A. As far as the definition of "motor fuel" in 58-687, too, that is correct.

Q. It existed until 1962 and, under the interpretation which you have testified here today, Shell 640 would have been taxed under that Section, would it not?

A. I am not positive that the alterations or the amendments made in 14 do not require us to tax it under that Section after 1960. I have stated before that I thought the interpretation was clear, that it could be taxed under the provisions of 58-687 (2), and I still think so.

Dep. 4/17/63 page 34

Q. And that interpretation would have continued up until 1962, when that enactment was amended?

A. That is correct, sir.

C. H. Lamb

Q. So, despite the fact that the 1960 amendment to Section 58-732, under the Special Fuels Tax, states unequivocally that that tax only applies to fuels not subject to tax under Chapter 13, which is the Motor Fuel Tax Act, you, nevertheless, after March 30, 1960, applied the tax under the Special Fuels Tax Laws?

A. That is correct.

Q. And you did this because Chapter 14 then specifically provided for the taxing of Shell 640 Kerosene, is that correct?

A. It provided for the taxing of any fuel that was not taxed under Chapter 13. It is my understanding that the Shell 640 now properly falls under Chapter 14.

Q. As it did after March 30 of 1960?

A. Yes.

Q. If your interpretation of Chapter 13 was correct, why was it necessary for the Legislature to provide for that provision in Chapter 14, if, in fact, all aviation fuel used to propel aircraft was subject to the Motor Fuel Tax?

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A. I'm afraid I can't answer the question as to why the Legislature passed a particular bill, due to the fact this was not legislation requested by us or sponsored by us or requested to be sponsored by Members of the General Assembly. My main job, as far as this was concerned, was to view it from an administrative angle to see if it affected the administration of the whole Chapters by this division difference.

Q. I notice that this amendment in 1960 was effective on March 30, 1960, which means it was emergency legislation under our laws. What was the emergency that necessitated the passage of this Act?

A. Again, I can't answer the question as to what emergency existed, as to why it was absolutely necessary to have it at that time.

Q. Could it possibly have been because of the fact that throughout 1959 your interpretation of the Motor Fuel Tax Act had been challenged by several sources, as indicated by these letters introduced, as to the applicability of the Motor Fuel Tax Laws to fuel of the type known as "jet aviation turbine fuel?"

A. Such a thing is possible.

Q. Do you know who did sponsor this legislation in 1960?

Dep.

A. I am relying strictly on memory at the present time. I believe that it was offered by Mr.

4/17/63 page 36 } Grady Dalton, at the request of the Bureau of Aeronautics of the State Corporation Commission. I think I am right about Mr. Grady Dalton.

Q. Commissioner Lamb, if I recall your testimony correctly, you indicated in the questions from Mr. Woodroof that Shell Oil's petition to the Department of Taxation, filed in December of 1959 and received here at your office, did not constitute a protest?

A. If I remember my answer, I said that, when making the reports and paying the tax, no protest was made by the taxpayer Shell Oil Company.

Q. But you did not deny filing such an application would constitute a protest when they were trying to get back the tax monies?

A. I did not deny or identify it as a protest. I simply said when they made the reports they made the payments and no protest was made at that time.

Q. I am handing you the letter introduced as Plaintiff's Exhibit No. 10, directed to you on July 28, 1960, signed by Mr. Legg of Shell Oil, and ask you if this doesn't constitute a protest as to the collection of taxes on Shell 640 Kerosene?

Dep. 4/17/63 page 37 } A. I am afraid I am not qualified to define protest or draw any fine distinction. I would say they are very strongly questioning the fact and were protesting the reporting and payment in their own language. Whether or not that constitutes a protest, really, I am not prepared to say.

Q. Would you state the date of that?

A. July 28, 1960.

REDIRECT EXAMINATION

By Mr. Woodroof:

Q. Mr. Lamb, Mr. Adams has questioned you rather extensively concerning the laws as amended since the end of the period in question here, which was March 31, 1960. Under the Code, as amended, to take effect after March 31, 1960, is there any difference in the rate of tax levied on aviation fuel by Chapter 13 and the rate levied on it by Chapter 14 of Title 58 of the Code of Virginia?

A. If I understand you correctly, it is this. Do they levy the same tax on the fuel taxed under the provisions of Chapter 13 and Chapter 14?

Q. Correct.

A. The fuel tax, as far as it applies to aviation fuel—and, I think that is the subject we are confining this to—it is the identical, same tax.

Dep. 4/17/63 page 38 } Q. And it would be the same amount of tax? As far as the tax, it wouldn't make any difference to the payer or receiver in the State of Virginia as to paying the tax, no matter under which Chapter it was collected?

A. As far as amount was concerned, it would make no difference.

Q. Did these amendments, to which he referred and you have been discussing, include changes other than those relative to the placing of certain aviation fuel taxes over into 14 rather than Chapter 13—were there other changes, or did it just relate to such a change?

A. I believe I can answer that by reading the note under 58-715, "Refund of tax on motor fuel," which states, "The 1960 amendments. The first 1960 amendment, effective March 30, 1960, inserted the provisions for graduated refunds of the tax on aircraft fuel, to be given effect on and after July 1, 1961. The second 1960 amendment, effective July 1, 1960, increased the refund provided for in the third sentence from two to three cents and the refund provided for in the second from the last sentence from five to six cents." That is all that has any application to aviation fuel.

Dep. 4/17/63 page 39 } Mr. Adams: May I interject one point? Those were not effective under the emergency provisions we discussed earlier, because they became effective in July.

The Deponent: They carry the dates, one in 1961, one in 1960.

Q. (By Mr. Woodroof) Now, Mr. Lamb, Mr. Adams pointed out in his questioning that, if a taxpayer did not make the reports required to be made, that there was a law which would affect him adversely if he were in the wrong in so doing, is that correct, sir?

A. That is correct, sir.

Q. I hand you the Code of Virginia, Section 58-726, which was in effect during the period in question—that is, January 1956 through March 1960, and I would ask you to read that Section, if you will.

A. Section 58-726, "When Commissioner may estimate motor fuel received; assessments as evidence.

"Whenever any dealer shall neglect or refuse to make and file any report for any calendar month as required by this chapter or shall file an incorrect or fraudulent report, the Commissioner shall determine, from any information obtainable, the number of gallons of motor fuel with respect to which the dealer has incurred liability under the motor fuel tax laws of the State. In any action or proceeding for the collection of the motor fuel tax and any penalties or interest imposed in connection therewith, an assessment by the Commissioner of the amount of the tax due and interest or penalties due to this State shall constitute *prima facie* evidence of the claim of the State and the burden of proof shall be upon the dealer to show that the assessment was incorrect and contrary to law."

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Q. Mr. Lamb, I will ask you, should the occasion arise during the period in question here, that a dealer fail or refuse to report the taxes on aviation fuel, is this Section the one that you would take action under as a preliminary or first measure? In other words, if he did not report it, is this the Section or weapon that you would use to get at the tax, or is it not?

A. This is the Section that we would use. We would make an assessment on whatever information was available.

Q. During the period in question, from January 1, 1956, through March 30, 1960, were you ever called upon to put this Section into operation and make such an assessment against Shell Oil Company?

A. No such action was necessary, as I have stated before. The reports were made and the payments timely.

Q. Now, Mr. Lamb, I would ask you to now read Section 58-689 of the Code of Virginia, as it was in effect during the period in question, from January 1, 1956 through March 30, 1960.

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A. Section 58-689 reads as follows: "Appeal to courts from Commissioner's decisions.

"Any person against whom an order or decision of the Commissioner has been adversely rendered relating to the granting or cancelling of a license, the filing of a bond, the increasing of the amount of a bond, the changing of surety on a bond, the filing of reports, the examination of records or any other matter wherein the findings are in the discretion of the Commissioner may appeal from such order, decision or action to the Circuit Court of the City of Richmond, if such appeal is filed within fifteen days."

C. H. Lamb

Q. Mr. Lamb, during the whole course of this transaction, the whole period—1956, 1957, 1958, 1959 and to March, 1960, did Shell Oil Company ever avail itself of this Statute here against you or against any order or any assessment or any levy or any collection that you made?

A. Shell Oil made no such appeal application, under the provisions of Section 58-689.

Q. Mr. Lamb, did the Shell Oil Company ever, during this period, obtain an injunction against you for collecting this tax against them in any court or in any way or attempted to, to your knowledge?

A. To my knowledge, they neither attempted to or obtained any injunction in any court.

Dep. 4/17/63 page 42 } Q. Did they, in fact—do your records show, have you seen anything to show that they even wrote to you and protested during that period regarding this tax?

A. The reports were made and the taxes paid and there is nothing in our records to indicate any protest was made at that time.

Q. And this letter of July 28, 1960, is the first notice directed to you by the Shell Oil Company in this regard?

A. I am advised that this letter of July 28, 1960, from the Shell Oil Company, addressed to me as Commissioner, is the first communication addressed to me, as Commissioner, from the Shell Oil Company on this subject.

Mr. Woodroof: All right, sir.

RECROSS EXAMINATION

By Mr. Adams:

Q. Commissioner, you certainly don't contend under Section 58-689, that, whether a particular motor fuel is or is not subject to the Motor Fuel Tax Laws, is within your discretion, do you?

A. I was answering that question with reference to what is contained in this particular Section, with reference to, let's say, the filing of reports.

Dep. 4/17/63 page 43 } Q. Only with respect to filing of reports?

A. Or any other matter wherein the findings are in the discretion of the Commissioner.

Q. But, whether or not a particular motor fuel is or is not subject to Motor Fuel Tax Laws is not within your discretion?

Mr. Woodroof: I object to that question. Your whole allegations as to—

Q. (By Mr. Adams) You don't contend it is a matter within your discretion, do you?

A. If it falls within the definition of Chapter 13 or Chapter 14, then it is not in my discretion whether or not the tax shall be collected. I have expressed an opinion as to the definition.

Q. But, whether or not a particular motor fuel is or is not subject to the tax is not a question within your discretion?

A. Only so far as the definition might be in my discretion or an opinion of mine. I am making the distinction. I have said that, in my opinion—

Q. It was within the Act?

A. It was within the Act. Then, by being within the Act, no discretion is left whether or not you collect tax. If it is imported and sold or used, then the tax has to be collected.

Dep. 4/17/63 page 44 } Q. So, it's a question of whether or not it is within the purview of the Act and not whether or not it is within your discretion?

A. Right.

Mr. Adams: That is all.

Mr. Woodroof: Just one more question.

By Mr. Woodroof:

Q. Mr. Lamb, do you hold that, when you go to apply this Statute or any other Statute, that you have the right to make an administrative determination of what the Statute means—yes or no?

A. I think, in this and all other cases of administration the Act gives the Commissioner authority to adopt rules and regulations, take action not inconsistent with the Act.

Q. And do you make an administrative determination in each case, is that correct?

A. I think it is absolutely necessary in the operation of an administrative agency.

Q. Do you consider that administrative determination discretionary?

A. If you mean discretionary, as based on the facts as they exist at that time, yes.

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Ore Tenus Hearing on April 22, 1963 before Honorable John Wingo Knowles, Judge.

APPEARANCES:

JOSEPH C. CARTER, JR.)
JOHN J. ADAMS)
GRAVES H. BRICE)
Counsel for the Petitioner

D. GARDINER TYLER, Assistant Attorney)
General
A. R. WOODROOF, Assistant Attorney General)
Counsel for the Defendant

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Mr. Tyler: I understand from counsel, he has stated at the bar of this Court, that the Shell Oil Company now takes the position that it is bringing these two cases for the benefit of Capital Airlines and Piedmont Aviation. Is that what you stated, sir?

4/22/63 Mr. Carter: That is correct.

page 10 } Mr. Tyler: That being the case, the Commonwealth wishes to make this motion, a motion to dismiss both petitions or applications as the position now taken by the petitioner is that it has no real interest in the error of these taxes, and that Capital Airlines, Incorporated, now the United Airlines, Incorporated and the Piedmont Aviation, Incorporated are the real plaintiffs for the following reasons: First, the Statute under which these proceedings are brought does not permit one person or corporation to recover taxes for the benefit of some other person or corporation. Second, only the real party in interest can maintain such an action. Third, the petitioner, having admitted that it has no interest, cannot maintain an action on behalf of another party allegedly having a substantial interest. Fourth, the "Tax Refund Laws" will be rendered in utter confusion if one person were permitted to assert such claims on behalf of other persons. Fifth, Section 58-1130 of the Code of

4/22/63 Virginia, under which these cases are brought,

page 11 } under which this Court derives its jurisdiction, expressly states that the person making application for relief must be, first, a person against whom the assessment was made and, second, the person aggrieved by any such assessment. The petitioner cannot show that it is the aggrieved person, for it has already been reimbursed by its customers from whom it exacted the money which it now seeks to recover from the Commonwealth, and now admits that it has no interest in the funds sought to be recovered in these cases.

That is the motion, sir, that we make.

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The Court:

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page 13 }

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So, I overrule the motion and direct you to note the exception.

4/22/63
page 14 } Mr. Tyler: We except to Your Honor's ruling.

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ELLSWORTH BOSIEN, a witness called by and on behalf of the petitioner, after being duly sworn, testified as follows:

Ellsworth Bosien

DIRECT EXAMINATION

By Mr. Adams:

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Q. Mr. Bosien, I hand you three documents, which I will appreciate your identifying. Identify the first one, please.

A. Yes, sir. The first is a certificate from the State of Delaware. It states Shell Oil Company is incorporated and authorized under the State laws of Delaware.

Mr. Adams: I would like to enter this as Petitioner's Exhibit No. 13.

NOTE: So marked and filed.

Q. (By Mr. Adams) I hand you the next one, which I will appreciate your identifying.

A. This is a document from the State Corporation Commission of the Commonwealth of Virginia, which states Shell Oil Company is authorized under the laws of the State of Delaware and holds a certificate of authorization to transact business in Virginia.

Q. It is dated?

A. The 28th of September, 1949.

Q. Excuse me, the document is dated?

A. April 11, 0963.

4/22/63 Q. I hand you a third document, which I will
page 25 } appreciate your identifying.

A. The third is a certificate from the State Corporation Commission which states that the office at which all claims against Shell may be entered, audited and settled and paid, was designated as the Central National Bank, Richmond, Virginia, on September 28, 1949 and it remained unchanged until the registered office was established on March 18, 1959 in Richmond, Virginia. That office is presently located at 10 South 10th Street, Richmond 19, Virginia. This document is dated April 19, 1963.

Ellsworth Bosien

Mr. Adams: I would like to introduce these last two documents as Petitioner's Exhibits 14 and 15.

NOTE: So marked and filed.

Q. (By Mr. Adams) Mr. Bosien, does Shell also maintain any other office other than its registered office in the City of Richmond, Virginia?

A. Yes, since 1939 we have had a sales office in Richmond. For the last ten years this office has been the District Sales Office, encompassing operations for practically the entire State of Virginia.

Q. And this office is presently located where?

4/22/63 A. At 1004 North Thompson Street.

page 26 } Q. And it has been for the last ten years?

A. Yes, it has.

Q. Mr. Bosien, were there any other offices maintained by Shell in this state during at least the last ten years where claims against Shell were received, settled and paid?

A. No. The only two offices that could receive, settle and pay claims would be the registered agent at 10 South 10th Street and the District Sales Office at 1004 North Thompson Street, both in the City of Richmond. We had three other locations in the State of Virginia. We have a bulk storage and distribution plant in Norfolk, Virginia, in Bellwood, Virginia and Roanoke, Virginia, but claims wouldn't have been received, processed and paid at these offices. If a claim was received by those offices it would have been immediately transferred to the District Sales Office at 1004 North Thompson Street for further processing.

Q. Now is this District Sales Office of which you speak under the direct supervision of the Division Office located in Baltimore?

A. Yes, it is and all claims would be processed by the District Office here in Richmond, unless there was

4/22/63 some reason why the refund could not be made or

page 27 } the claim could not be processed completely here in Richmond, and then it would be sent to the Division Office in Baltimore and payment would be made from that office.

Q. But the only office in this State where such claims could be processed are which two?

A. The two offices here in Richmond, 10 South 10th Street and 1004 Thompson Street.

Ellsworth Bosien

Q. Over the past ten years has Shell ever sold any of its Shell 640 Kerosene to Capital Airlines, Incorporated and Piedmont Airlines, Incorporated in Virginia?

A. Yes, I believe starting about 1955 we started selling 640 Kerosene to Capital Airlines and, about 1958, we began selling it to Piedmont Airlines.

Q. Now is Shell 640 Kerosene a gasoline?

A. Oh, no.

Q. Is it your understanding that it is within the statutory distillation tests prescribed under the Motor Fuel Tax Laws of Virginia?

A. It is my understanding that it is not.

Q. Now Mr. Bosien, where would any reports and returns relating to and any taxes that were paid upon any of these gallons of Shell 640 Kerosene which was sold to Capital and Piedmont—where would they have been prepared, these reports and returns on taxes paid?

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A. They would have been prepared in the Baltimore Division Office, Treasury Department, P. S. and T. section of which I am supervisor. They would have been prepared in the Baltimore office, P. S. and T. section and forwarded to the Commonwealth of Virginia. The reports would have been filed and the checks paid to the Commonwealth of Virginia.

Q. What agency of the Commonwealth of Virginia?

A. The Department of Taxation, Division of Motor Vehicles.

Q. May I correct you on that? Was it directed to the Division of Motor Vehicles and not the Department of Taxation?

A. Yes, sir, it was—to the Division of Motor Vehicles.

Mr. Woodroof: I object to leading the witness.

Q. (By Mr. Adams) Does the Division of Motor Vehicles audit your books and records on sales of all fuel sales made in Virginia? And, if that is true, where is that audit done?

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A. They periodically come to the Division Office in Baltimore to perform this audit, 200 East Joppa Road, Baltimore 4, Maryland.

Q. Could these records be audited at the District Sales Office of Shell here in Richmond?

A. You say "Could they be audited here in Richmond?"

Q. Yes.

A. Yes, they could be, but it would be very impractical

and expensive. We would have to bundle up our records for the period under audit, which would take a truck or more to bring the records down here, they would have to be un-boxed —I don't know whether they would be in a workable condition at that time—the audit would be performed, the boxes would have to be packaged up again and sent back to our office. While the records are down here, our Division Office in Baltimore pays tax returns for a seven-state area and, if auditors from any of the six other states came in to audit our records, they could not audit them because the records would be in Virginia. So it would be impractical. If we receive any customer correspondence concerning invoices, we couldn't answer the correspondence because we would not have the invoices in our file. So it would be a very impractical measure, actually, to send the records. And I don't believe the Commonwealth of Virginia has ever asked that the records be sent to Richmond.

4/22/63
page 30 } Q. To your knowledge, Shell has never been requested to bring these records down to Richmond?

A. No, they have not.

Q. Now, Mr. Bosien, it's already been introduced into evidence, the three applications prepared by Shell Oil which were filed with the Department of Taxation, seeking refund of erroneous assessments sought in this suit. These applications were dated December 23, 1959, June 1, 1960, both in respect to the fuel sold Capital Airlines, and then the one petition filed on behalf of recovery for the fuel sold to Piedmont was dated December 26, 1961. Now has Shell Oil ever received any notice that any action has been taken by the Department of Taxation on these applications?

A. We have no record of any action being taken on these three applications.

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CROSS EXAMINATION

By Mr. Tyler:

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Q. (By Mr. Tyler) The tax on this 640 Kerosene that you all now seek to recover from the Commonwealth of Virginia—who paid the taxes?

A. We paid the tax to the Commonwealth of Virginia and included that in the price of the product to these customers. In other words, we have over-paid Virginia and they have over-paid us. As soon as we receive the refund from Virginia, we will refund over the payment to them.

Q. So you have been paid?

A. Yes, sir. So the airlines are out this money.

Q. And not Shell Oil Company?

A. That is correct.

Q. Has the Shell Oil Company agreed with Capital Airlines and Piedmont Aviation, Incorporated to pay them the amount of the taxes which it collected from them when this so-called "Shell 640 Kerosene" was sold, irrespective of the outcome of these cases?

A. Could I ask a question? Do you mean would
4/22/63 we refund this money to them out of our funds if
page 34 } we do not collect a recovery in this court?

Q. Yes, sir, that is the question.

A. No, sir, absolutely not.

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Q. (By Mr. Tyler) Now I exhibit to you here a letter which has been marked as Petitioner's Exhibit No. 9. Are you familiar with that letter?

A. Yes, sir, I am.

Q. Will you read it to the Court?

A. The letter is dated April 13, 1955, addressed to the Commonwealth of Virginia, Division of Motor Vehicles, P.O. Box 1298, Richmond 10, Virginia.

Ellsworth Bosien

"Attention: Mr. C. L. Briggs
Gentlemen:

We are anticipating sales of kerosene to one of our customers in Virginia which we understand will ultimately be used for fuel for jet aircraft. At present these deliveries will be made in the Norfolk area only.

4/22/63 page 36 } Please advise if the Virginia Motor Fuel Tax is applicable on sales of this type.

Very truly yours,
B. A. Fox
Treasurer Manager"

Q. (By Mr. Tyler) This is Petitioner's Exhibit No. 10. Will you read that to the Court?

A. This is addressed to Shell Oil Company, 909 East 22nd Street, Baltimore 18, Maryland, April 18, 1955.

"Attention: Mr. B. A. Fox
Gentlemen:

This has reference to your letter of April 13, 1955, in which you inquire as to the tax on fuel used in Jet aircraft.

Sub-section 3 of Section 58-687 of the Code of Virginia, (Motor Fuel Tax Act) defines "aviation fuel" as a "motor fuel designed for use in the operation of aircraft, and sold or used for that purpose," and as such is subject to the tax of six cents per gallon.

All such sales should be reported on your regular monthly Motor Fuel Tax report.

Yours very truly,

C. H. Lamb, Commissioner

By: Charles L. Briggs,
Director, Bureau of Gasoline Tax"

4/22/63 page 37 } Q. That letter seemed to be clear enough, did it not, as far as the position of the Commonwealth was concerned regarding these taxes?

A. Yes, sir.

Q. Now after receiving that letter, what did your company do?

A. We passed this information on to the airlines, that the product they purchased from us in Virginia would be subject to the State tax.

Ellsworth Bosien

Q. All right. And after that you sold this product to their airlines, did you not?

A. Yes, we did.

Q. And upon the sale of it, did you require them to pay the tax?

A. Even though we did not feel the tax was just, because of the mandatory ten percent penalty in the Commonwealth of Virginia, we paid this tax.

Q. So, therefore, knowing or believing that the tax was not properly debited or levied or imposed, you collected it from your customers?

A. And paid it to the Commonwealth of Virginia, yes, sir, because we could not afford a ten percent penalty on all this gallonage.

Q. The tax was paid on this gallonage each month, was it not?

4/22/63 page 38 } A. Yes, sir. The reports are filed monthly.

Q. Well, now, unfortunately we do not have the initial month here, July 1956, but we have other months here that were comparable to that, I take it. (Indicating document) Now you state, then, the only reason that you did not pay it was you wanted to avoid the ten percent penalty, is that correct?

A. When in question, we would pay the tax, yes, sir.

Q. You knew from April, 1955 until July 1, 1956 when you began paying the tax, which is more than a year, that the Commonwealth of Virginia was going to require you to pay the tax and you took no action whatsoever to have it judiciarily determined whether it was proper, is that correct—or improper?

A. I cannot state that we took no action. I do not know that fact.

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Q. (By Mr. Tyler) I hand you herewith a document which is a part of the Defendant's Exhibit No. 2 and ask you to examine the same and identify it.

A. This appears to be a tax return prepared in the P. S.

and T. Section, Shell Oil Company's Division Office in Baltimore for the month of November 1957. The first page, I know, is one prepared in that office because it has a signature on it. I assume the others were also prepared there.

Q. This is a report which is fairly representative of the others and I will ask you to state to the Court the extent of the tax on that report.

A. The amount of the tax on aviation gasoline for the month of November 1957 was $12,156.68.

Q. Does your report list the 640 Kerosene separately?

A. This particular report does not list the Jet fuel separately. On Schedule 16-A on Statement No. 2 it is listed separately.

Q. On Statement No. 2 there are two items that have been described as "Jet fuel." Does that include only all
4/22/63 items on that page?
page 42 } A. There are four items on Statement No. 2 for the month of November.

Q. You cannot look at that and tell the taxes, can you?

A. Statement No. 2 is non-taxable sales, so there are no taxes involved.

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Q. (By Mr. Tyler) We would like to conclude this witness' examination by having the witness read the statement made by the Shell Oil Company on those reports so the record would show it. The statement is right here. (indicating)

A. We do not type a statement on this report, but the forms are furnished by the Commonwealth of Virginia. They have a statement in the signature block so, by signing
4/22/63 it, the statement is typed above our signature. "In
page 48 } accordance with Chapter 13, Title 58 Code 1950 and Acts Amendatory thereof, I hereby swear or affirm, that the statements on this form with attached supporting schedules is a true and correct statement of the transactions in motor fuel by the undersigned."

Q. I also ask you to read the caption of the document. What is typewritten immediately thereon?

A. "The Division of Motor Vehicles, Richmond, Virginia, Dealer, Motor Fuel Tax Report, Aviation Including Jet Fuel." The "Aviation, Including Jet Fuel" was typed in by Shell Oil Company.

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HONORABLE C. H. MORRISSETT, a witness called by and on behalf of the defendant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

4/22/63 By Mr. Tyler:
page 50 } Q. Will you please state your name and occupation?

A. C. H. Morrissett, Virginia State Tax Commissioner.

Q. And you are an attorney in your profession?

A. I am.

Q. How long has your service been continuous in the office of the Tax Commissioner?

A. Since April 15, 1926.

Q. Were you a member of the commission appointed to revise, collate and qualify the General Tax Laws of Virginia, pursuant to an Act approved March 27, 1926 by the General Assembly of Virginia?

A. This is the book. (Indicating)

Q. I hand you herewith a leaflet entitled, "Report of the Commission to Revise, Collate, Simplify, Codify the General Tax Laws of Virginia," Document No. 7, dated 1928, and ask you to identify the same.

A. This is a copy of the "Report of the Commission to Revise the General Tax Laws," 1928.

Q. Now, will you turn to page thirty-three and read to the Court excerpts on that page?

4/22/63 The Court: Read "excerpts" from that page?
page 51 } Mr. Carter: We object to that, Your Honor. The document speaks for itself, it's an official

document before this Court and available to counsel for argument from it. We see no reason to have it read to the Court at this time.

The Court: Do you have any particular piece you want him to read?

Mr. Tyler: Yes, sir, two paragraphs.

The Court: Tell him which.

Q. (By Mr. Tyler) In reference to the Motor Fuel Tax Laws of Virginia, will you—

The Court: I overrule the objection. Will you please read it, Judge Morrissett?

A. The paragraph reads as follows:

"In assembling the material for the preparation for the Tax Code of Virginia, the Commission decided that it was wise to omit from the Tax Code certain Acts involving taxes for the reason such Acts have never been looked upon as constituting the General Tax Laws of this State. An additional reason was that the taxing provisions of many of these Acts are so interwoven with regulatory provisions that the taxing provisions could not be revised without also revising the regulatory provisions. The outstanding illustration of this class of Acts is the Motor Vehicle Laws of this State. The Motor Vehicle Fuel Tax Laws have also been omitted from the Tax Code of Virginia because they would seem to belong more properly in a codification of the Motor Vehicle Laws. The same is applicable to the taxes on motor vehicle carriers."

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Q. As a result of that study and that report, did the General Assembly of Virginia take the recommendations that you have just referred to?

A. The General Assembly enacted the Tax Code of Virginia in 1928. This particular recommendation about omitting from it the Motor Vehicle Laws and the Motor Fuel Laws was acted upon favorably. That is to say, they were omitted from the Tax Code of Virginia of 1928.

Q. I ask you this, then. Has the Motor Vehicle Tax Laws ever been a part of the Tax Code of Virginia?

A. Never a part of the Tax Code of Virginia of 1928.

Q. Are they considered a part of the Tax Code of Virginia today?

C. H. Morrissett

A. Well, we do not have a Tax Code of Virginia anymore. That was discontinued in the general codification of 1950.

4/22/63 page 53 } Title 58 of the Code of 1950 as amended, contains a great many of the tax laws of the State, as you know.

Q. And, as State Tax Commissioner, have you ever had the authority to—

The Court: I cannot hear you, Mr. Tyler.

Q. (By Mr. Tyler) As State Tax Commissioner, have you ever had the authority to supervise the collection of the tax on motor fuel and make refunds under the provisions of the Motor Fuel Tax Laws?

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A. The Statutes have never conferred upon the State Tax Commissioner any authority with respect to the Motor Fuel Laws or the Motor Vehicle Laws. Those laws, the Motor Vehicle Fuel Laws and the Motor Vehicle License Laws, are not now, nor have they ever been within the purview of the activities of the Department of Taxation.

Q. (By Mr. Tyler) Who is the executive head of the Department of Taxation?

A. The State Tax Commissioner is the chief executive officer, and I happen to hold that office at the present time.

Q. Now these petitions are brought under the provisions of

4/22/63 page 55 } Section 58-1118 or Section 58-1130 of the Code of Virginia, and there is a reference in one of the petitions that a petition for relief was filed with the Department of Taxation in December, 1959, under the provisions of Section 58-1118 of the Code. I ask you, under the provisions of Section 58-1118, what is considered by the Taxing Authority as an "assessment?"

* * * * *

C. H. Morrissett

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* * * * *

Q. (By Mr. Tyler) I will refer you to Section 58-1118 and, state to the Court whether or not there is any class of taxation which would include the sales tax on motor fuels which would give the Tax Commissioner the authority or right to consider such an application which was filed with the Department in December 1959 by the Shell Oil Company.

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Q. (By the Court) Judge, do you remember that question?
A. The administrative interpretation and application of Section 58-1118 of the Code of Virginia has been that it applies to those taxes enumerated, concerning which the Department of Taxation is given specific authority. The term, for example, "license tax," would include license taxes assessible by the Department of Taxation or by the Commissioners of Revenue of the counties and cities. The term—in fact, no subject of taxation enumerated in 58-1118 which
4/22/63 is looked after by another department of the State
page 63 } government has been regarded, in administrative application and interpretation, as falling within the jurisdiction of the Department of Taxation.

* * * * *

Q. (By Mr. Tyler) From your answer, I take it that the tax on a "motor fuel," as we have under Chapter 13 Section 58, is not such a tax, the collection of which you
4/22/63 could entertain a petition under 58-1118?
page 64 } A. The position of the Department of Taxation was and is that it had no jurisdiction to entertain a petition or application under Section 58-1118 with respect to a Motor Fuel Tax. That is simply because the Statutes nowhere confer upon the Department of Taxation any powers

or duties with respect to the State Motor Fuel Tax. And when the petition was received in December, 1959, it was in routine fashion sent on to the Division of Motor Vehicles, because I felt that, obviously, counsel or whoever prepared the petition may have thought the Division of Motor Vehicles was a division of the Department of Taxation, whereas it is a separate and distinct Department of government, although it is called a "division."

By the Court:

Q. As a practical matter, whenever you get communication from out-of-State counsel, you generally follow the custom of directing it to the proper party?

A. Yes, sir. We get a lot of mail that doesn't belong to us.

By Mr. Tyler:

Q. Is it not correct, Mr. Commissioner, you did help draft the 1923 Act imposing the first sales tax on gasoline?

4/22/63
page 65 } A. I was the official Legislative Draftsman back in 1923 and it fell in my duties to prepare that bill.

Q. Would you state to the Court the character of the tax or the kind of taxes provided under the Motor Vehicle Fuel Tax?

A. I have always looked upon the gasoline tax as a sales and use tax.

Q. Is the sales tax under that Statute considered a "license tax?"

A. We do not have, so far as I can recall, but one "sales tax," by that particular name in Virginia, and that is the Tobacco Tax that is denominated as "sales tax." But I do not recall that the Motor Fuel Tax Laws give the definition, whether it is a "sales tax" or "sales and use tax," or whether it does not. It is certainly an excise tax.

Q. It does not use the words "sales" in the Act as the Tobacco Act, is that it?

A. Well, it would say, "sold and delivered or used." Now that is the language of the provisions of the Motor Fuel Tax. The reason I referred to the Tobacco Tax was because the Legislature itself has denominated that a "sales tax" in so many words, but we do not have a general sales tax in Virginia.

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CROSS EXAMINATION

By Mr. Carter:

Q. I would like to call your attention, first of all, Judge, to Section 58-1119 of the Code.

A. Yes?

Q. And, particularly that portion which appears at the top of page 313.

A. Yes, sir.

Q. There is a statement there, and this Section deals with the action taken by the Department when an application is filed under Section 58-1118?

A. That's right.

Q. There is a statement there to this effect, "... and to this end the Department shall be clothed with all the powers and duties of the authority who made the assessment complained of, as of the time when such assessment was made ..." Could you tell us, please, sir, why there was
4/22/63 any necessity for that language to be included in
page 67 } the Section if Section 1118 is limited only to those sections where the Department of Taxation has the assessing power?

A. The language referred to was necessary because the Commissioners of the Revenue of the counties and cities assess a great many State taxes, and that is why it was put there.

Q. Now I would like to ask you, if you will look at Section 58-1130 as compared with Section 58-1118, and tell us whether, in your opinion, both of these Sections cover the same general categories of taxes?

A. It is obvious that the draftsman of those Sections used very much the same language in drafting them. Now I can testify as to the administrative application of 58-1118 but, when it comes to 58-1130, I believe that is a question that is for the Court to determine.

Q. Isn't it also true, Judge Morrissett, that those same general categories of taxes specified in the two Sections we have just been discussing, are the same categories listed in

the Sections of the Constitution which deal with taxation, have reference to Section 168, 170, 173 and so on?

A. There is no paralleling here, of course, with any Constitutional provisions. In these Sections, on erroneous assessment, the Constitutional provisions are broadly written, as you know. And these relate to specific Statutes that the General Assembly has enacted.

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Q. Why, as a matter of routine, do you forward to the Division of Motor Vehicles, applications for refunds of Motor Fuel Taxes, under Chapter 13?

A. For lack of jurisdiction.

Q. Judge Morrissett, in your judgment does Chapter 13 provide for any remedy to the taxpayer for erroneous assessment of Motor Fuel Taxes?

A. I would not like to testify as to Chapter 13. I think I can testify as to the matters that come within the jurisdiction of the Department of Taxation, but when we go beyond that I doubt if I should express any view.

Q. Well, Judge, assuming that there is no specific provision in Chapter 13 dealing with Motor Fuel Taxes for either administrative or judicial relief from erroneous assessments, in your judgment, what would the remedy of the taxpayer be?

A. The taxpayer would be compelled to rely on the Statute on which it could rely, if such a Statute could be found. Now if there be no such Statute, then the taxpayer has no remedy.

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Q. Judge, isn't it true that in a number of cases from other jurisdictions and in general discussions, that the terms "excise tax," "sales and use tax" and "license taxes" are regarded as synonymous in many respects?

A. No, sir, by no means. Now a "license tax" and "sales tax" are both excise taxes, but the term "license tax" is much broader, more comprehensive in scope than the term "sales tax."

Mr. Carter: That is all, Your Honor.

REDIRECT EXAMINATION

By Mr. Tyler:

Q. Mr. Commissioner, I wish to refer you to Section 58-

1158 of the Code. I believe you stated on cross examination that sometimes there was no relief afforded the taxpayer. Now I wish you would state whether or not that Section of the Code corroborates your statement?

A. The point was that, if a taxpayer pays taxes, there has to be some Statute under which the taxes can be recovered. In Section 58-1158, if the taxes are recoverable at all, Section 58-1158 states that "No suit for the purpose of restraining the assessment or collection of any tax, State or local, shall be maintained in any court of this Common-
4/22/63 wealth except when the party has no adequate
page 70 } remedy at law."

Q. So, by virtue of that, according to that Section, there must be some instances where there is no adequate remedy at law, is that correct, in Virginia?

A. Well, according to my understanding, if taxes are voluntarily paid, you have to have some Statute under which you can recover them, if they are recoverable. Now if there be no remedy, then it is a matter for the Legislature to provide a remedy if the Legislature regards a remedy as proper.

Q. In other words, the courts of this Commonwealth are open to individuals that wish to enjoin the collection of illegal taxes, is that not correct?

A. I would not say that. I would not say I am prepared to answer that.

Mr. Tyler: All right, that is all.

The Court: You may be in a position, Mr. Tyler, to get a declaratory judgment in certain issues.

Mr. Tyler: I was not enjoined—

The Court: You cannot ask a blanket question like that.

Mr. Tyler: I withdraw my question. I think it was too broad. That is all.

* * * * *

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page 71 } CHARLES L. BRIGGS, a witness called by and on behalf of the Defendant, being first duly sworn, testified as follows:

Charles L. Briggs

DIRECT EXAMINATION

By Mr. Tyler:

Q. Please state your name and occupation.

A. Charles L. Briggs. I am presently retired, formerly with the Division of Motor Vehicles.

Q. How long were you with the Division of Motor Vehicles, Mr. Briggs?

A. It was better than thirty years.

Q. What Section of that Division did you do work in, sir?

A. The Motor Fuel Section all of the time.

Q. Were you Director of that Section?

A. For the last fifteen or twenty years.

Q. Fifteen or twenty years?

A. Yes, sir.

Q. As Director of that Section of the Division, did you follow the Legislative enactments when they affected the Statutes imposing taxes on fuels?

4/22/63 A. To the best of my ability.

page 72 } Q. Now I refer you specifically to the Sections of the Act of 1948, and ask you whether you have familiarized yourself with the Act passed at that time?

A. I was familiar with it, but since I have been retired from it for some time, I don't recall the details of those.

Q. Well, by that Act the Legislature of Virginia inserted a definition of "aviation fuel" in the—

The Court: Are you testifying, Mr. Tyler, or is the witness going to testify?

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Q. (By Mr. Tyler) Mr. Briggs, it was your duty as the Director of that Division, to receive and compile and check the reports that were made by the various dealers, is that correct?

A. That's right.

Q. I ask you to examine this document here, which is a part of the Defendant's Exhibit No. 2, and tell the Court what it is.

Charles L. Briggs

A. This is the monthly gasoline tax report, as required by the Statute, showing the various information consisting of inventories at the beginning, purchases during the period, closing inventory and disbursements, amount of sales, temperature adjustments, amount of tax due supported by various schedules, itemized.

Q. Is that the report on which the tax is based?

A. Yes, and accepted as correct until audited and found to be incorrect.

Q. Well, Mr. Briggs, will you examine that report and state to the Court whether or not the product known as "Shell 640 Kerosene" is listed separately?

4/22/63 page 75 } Mr. Carter: If Your Honor please, I object on the ground that question is irrelevant, as it was this morning. The figures as to the sale and the taxes paid and the refunds paid have all been admitted by the Commonwealth.

The Court: Isn't that true, Mr. Tyler? Haven't you admitted so many gallons were sold and so much tax was paid and so many dollars or cents were refunded and collected? Is there any question about it? Isn't it true that when the Division of Motor Vehicles' people go to Baltimore, as they have in the past to audit the books, that they are shown—they have access to every invoice and that the invoices are going to show "Shell 640" and they are going to show whether it was Jet fuel or whether it was gasoline reciprocating engine fuel? And isn't it conceded that the gallons here are the gallons that were sold and the tax was paid? So what difference does it make what the forms show? We understand the methods of audit and what books are involved. You are not saying they are false, as I have filed any of these reports, are you?

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Mr. Tyler: I am saying they are not comprehensive enough to—

The Court: They collected the money on them. They were comprehensive enough for that, weren't they? And don't they speak for themselves? What I am getting at, Mr. Tyler, is why take a lot of time to have these people read each of these when you can pick them up and flip through in two seconds yourself and see whether it is or is not the one the witness from Shell Oil Company exhibited and about which he testified. He said it did not appear in 16-A but did appear on Schedule 2, if I remember correctly. I presume the same is

going to be true all the way through, they didn't break down Shell 640 in the original listing and all they showed was aviation fuel used outside of the State. That is about the only place it appeared.

Mr. Tyler: That is why I want to ask—

The Witness: That's right.

The Court: Mr. Briggs just corroborated it.

4/22/63 page 77 } He said that is correct.

But I still say you can pick up the form and look at it and tell.

Q. (By Mr. Tyler) In figuring those reports, did Shell Oil Company ever enter a protest to you concerning this particular product "640 Shell Kerosene," paying the tax on that product?

A. To the best of my recollection, there was a question about this at the very beginning of the use of Jet fuel, and we interpreted that any fuel used in an airplane was covered by the Code and we so wrote the Shell Oil Company. And from that time on until I retired, they continued to pay the tax on this product.

Mr. Tyler: All right. Thank you, Mr. Briggs.

By the Court:

Q. Just for my information, when were you retired?

A. 1960.

Q. What month?

A. June 30th.

CROSS EXAMINATION

By Mr. Carter:

4/22/63 page 78 } Q. Mr. Briggs, you have stated that, in 1955, you were requested by Shell Oil Company to give an interpretation as to whether the Motor Fuel Tax applied to kerosene Jet fuel, and you replied that it did, is that correct?

A. Yes, sir.

Q. There is also in evidence an exhibit which is a letter from you to the Gulf Oil Company early in 1959, giving the same interpretation to them. Do you recall that letter?

A. No, not definitely, no. But, I probably did.

Q. Let me ask you this. For the period from late 1955 until you retired in 1960, was the interpretation you gave the

Shell Oil Company in 1955 consistently applied to all kerosene used in Jet fuel of this type?

A. Definitely.

Q. So it would have been futile for any taxpayer to have made further protest after that interpretation was announced, wouldn't it?

A. That's right. I think they made one claim and it was refused.

The Court: You think Shell made a claim?

A. Wait a minute on that—no, let me get straight on that. The correspondence shows, then, they wrote to me about it.

4/22/63 page 79 } The Court: You cannot ask him. You will have to go on your own memory.

The Witness: He succeeded me. I thought his memory might be a little fresher than mine.

Mr. Carter: He may well be referring to the letter from Shell transferred to the Division very late in 1959—even the one Judge Morrissett sent over to the Division from the Department of Taxation.

The Witness: I think that was it.

Q. (By Mr. Carter) Mr. Briggs, during the period from 1955 until you retired in 1960, did the Commissioner of the Division of Motor Vehicles, to your knowledge, ever grant refunds of taxes erroneously assessed under Chapter 13 of the Code?

A. Oh, yes. We had quite a number of those refunds made.

Q. Can you tell us under what Section of that Chapter the Commissioner made refunds?

A. No, sir. I couldn't tell you right now. I would like to correct that a little bit. If we were found in error and it was in favor of the company, they were authorized to make the deductions from the subsequent report and, the same way, if we found shortages we made an assessment and charged it to them plus the penalty.

4/22/63 page 80 }

Q. Is there any formal procedure set up by Chapter 13 for filing a protest and application for refund and action on that by the Commissioner?

A. I don't recall that.

Q. Do you recall whether any such procedure is set up by Chapter 14, "Special Fuel Tax Laws?"

A. I don't remember.

Q. All right.

A. I tried to forget the Division of Motor Vehicles and everything else when I retired.

Mr. Carter: No further questions.

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JAMES W. FIELDER, a witness called by and on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Woodroof:

Q. State your name and occupation, please.

A. James W. Fielder, Director of the Bureau of Gasoline Tax, Division of Motor Vehicles.

Q. Mr. Fielder, what were your duties before

4/22/63 becoming Chief of the Bureau?

page 84 } A. I was Motor Fuel Tax Audit Supervisor.

Q. Were you in this position as Motor Fuel Tax Audit Supervisor during the period January 1, 1956 through March 31, 1960?

A. I was.

Q. In that capacity, what were your duties in reference to the reports filed by dealers under Sections 58-713 and 58-713.1 of the Code of Virginia?

A. My duty was to supervise the audits of the records of the various motor fuel dealers to establish a verification of their correctness, or whatever you might term it, of the reports as submitted to the Division of Motor Vehicles, to see that the tax was correctly computed.

Q. Where were these audits actually made?

A. We have always made our audits at the office where the general accounting is maintained.

Q. Will you state where the general accounting for the

State of Virginia was maintained by the Shell Oil Company?

A. In their Division Office located at 200 Joppa Road—I always called it "Towson," but I understand now it is Baltimore 4.

Q. Yes, sir. I think he said "Towson" also, Maryland.

4/22/63 page 85 } A. That's right.

Q. Mr. Fielder, according to the pleadings here, that Shell Oil Company has filed a petition, Case No. A-1803 alleging "That 904 East Main Street, Richmond 19, Virginia, c/o Robert H. Hanson, Registered Service Agent, is the principal office at which claims against a petitioner may be audited, settled and paid." Likewise, Case No. A-1808, Shell Oil Company has filed petitions alleging "That 10 South Tenth Street, Richmond 19, Virginia, c/o James M. Farley, Registered Service Agent, is the principal office at which claims against petitioners may be audited, settled and paid."

Have you visited these offices at any time in regards to the allegations read to you?

A. Yes. I went to 904 East Main Street, which is the State Planters Bank Building, looked on the bulletin board in the lobby and I couldn't find the name of—I don't remember whether it was—what was the first name of Mr. Hanson? Anyway, I couldn't find Mr. Hanson's name under any circumstances, so I brought the colored man who directs traffic to the elevators, asked if he knew of him. He said, "No," but he pointed to a gentleman standing at the entrance to the bank and he said, "Ask him. I think he knows everybody in the building." So I asked him and he said, no, he didn't know of it. He said, "If they had an office there, they might have moved," but he had never heard of it. So that was rather a fruitless trip, in not being able to locate Mr. Hanson. Then I proceeded from this building to 10 South Tenth Street, 7th Floor—I have forgotten the room number—to see Mr. Farley. When I got there the door was locked. This was approximately 3:00 to 3:15 in the afternoon, and I was just beginning to turn away when a lady walked out of the office next door to that office and said, "She is gone." I don't know whether that was Mr. Farley's secretary, except there was no one there. I said, "Well, I came to see Mr. Farley." She said, "Well, it's my understanding he is out of town and she—" whoever it was—"has gone to fill an appointment with the doctor."

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So, I actually had no results from that visit.

The Court: What date was this?
The Witness: Last Friday.
The Court: You did not go back in August 1961?
The Witness: No, sir.

Q. (By Mr. Woodroof) Did you make any—

Mr. Woodroof: Strike that out.

4/22/63 page 87 } Q. State the county or city in this State, if any, in which the Shell Oil Company maintains an office and when it is records of this nature may be settled, audited and paid. By "this nature" I referred to the Motor Fuel Tax and aviation fuel tax records which you audit.

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NOTE: Off-record discussion between the Court and counsel

Q. (By Mr. Woodroof) State where the audits of Shell Oil Company have been made, Mr. Fielder.

A. Well, they have been made in Baltimore since years ago when we had to go to New York and make most of them.

Q. Would you state whether or not you have been advised by the officials or agents of Shell Oil Company whether records of this nature could be audited in any office maintained by the Shell Oil Company in the City of Richmond, Virginia?

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A. I can't specify any dates. This was possibly a year ago or maybe a little less, or maybe a little more—particularly after these petitions came to our notice, I called Mr. B. A. Fox. He is the Division Treasurer, Manager for the Shell Oil Company at 200 Joppa Road, Baltimore 4, Maryland. I asked him if there was any place within Virginia that we could make an audit of their records pertaining
4/22/63 to the Motor Fuel Taxes and Special Fuels Taxes,
page 91 } and he said, "No, you will have to do it up here." That was the end of the conversation.

Q. (By Mr. Woodroof) Have you talked with any other agents or official of the Shell Oil Company in the City of Richmond concerning this proposition?

A. This last Friday, after making my other visits, I proceeded to 1004 North Thompson Street—I don't know exactly what time—the man is employed up there—

The Court: Do you know he was an employee?

A. Yes, sir. It was Mr. Weimer, Waverly Weimer. I asked if they maintained any records we could use for purposes of audit for verification of taxes. He told me there was no accounting in that office at all. I asked him about the various plants around the State. I mentioned particularly Richmond, Norfolk, Danville, Roanoke. He said they always have to maintain a certain limitation of records, such as maybe a truck copy of the invoice to make up a daily report, but he said for—and, of course, I realized for auditing purposes, if we had to visit every branch in the State to make our audits it would be spending three times as much time as going to Shell's office in Baltimore.

Q. Mr. Fielder, have you ever gone so far as to require any business concerned—what I mean by that is
4/22/63 dealer, to move all of his records from a foreign
page 92 } State to Virginia so you could audit it?

A. No, sir.

Mr. Woodroof: No further questions.

James W. Fielder

CROSS EXAMINATION

By Mr. Adams:

Q. In regards to the last question just asked, you have never specifically asked or required Shell Oil to bring its records to Virginia?

A. No.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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